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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

TUESDAY, FEBRUARY 2, 1988

Morning Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

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Cordiano, Joseph (Lawrence L)

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Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

McLean, Allan K. (Simcoe East PC) for Mr. Eves

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Intergovernmental Affairs:

Cameron, Dr. David, Deputy Minister

Stevenson, Donald W., Ontario Representative to Quebec and the Federal Government

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Tuesday, February 2, 1988

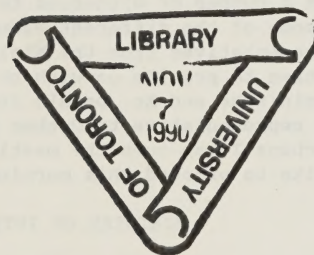
The committee met at 10:13 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD

Mr. Chairman: The chair sees a quorum. With the storm this morning, I think a number of us had interesting drives into the city. We apologize for the slight delay in getting this morning's proceedings under way.

Today begins the first of a series of public meetings the committee will be holding during this month and the month of March. ~~We have received~~

C-1015-1 follows



(Mr. Chairman)

~~with the storm this morning, a number of us had interesting drives into the city, so we apologize for the slight delay in getting this morning's proceedings under way.~~

~~Today begins the first of a series of public meetings that the committee will be holding during this month and the month of March.~~ We have received a very large number of requests, some 100 to 120, to appear before the committee and we are endeavouring to ensure that everyone who has requested to appear before the committee will have an opportunity to do so.

I thought that before beginning this morning it would be appropriate just to read the resolution that has asked this committee to undertake the work it is beginning today.

The resolution reads, "That a select committee on constitutional reform be appointed to consider and report on the 1987 constitutional accord, signed at Ottawa on June 3, 1987, and tabled in the House on November 23, 1987 (sessional paper 74) and matters related thereto."

That is the motion which has created this committee and it is our intention, over the next weeks and months, to endeavour to hear from those who have asked to make presentations to us, to read the various briefs people have sent in to us and then to consider very carefully what has been submitted and to bring in a report that we have been asked to submit by the end of the spring session.

Dans nos délibérations, nous aurons la traduction simultanée et nous savons fort bien qu'il y aura des francophones qui vont présenter leurs mémoires devant nous. Donc, nos séances, ici et à Ottawa, vont se dérouler dans les deux langues.

We felt that this week it would be particularly useful for the committee to hear from a number of witnesses to place the accord in context and to begin to look at some of the different viewpoints on it. To begin today, I want to welcome representatives from the Ministry of Intergovernmental Affairs. We have asked them to provide us with an historical context. Dr. David Cameron is the deputy minister and Mr. Donald Stevenson, who is beside Dr. Cameron, is the Ontario representative to Quebec and to Ottawa. Without further ado, Dr. Cameron, perhaps I can turn the meeting over to you and you can set out how you would like to proceed this morning.

MINISTRY OF INTERGOVERNMENTAL AFFAIRS

Dr. Cameron: Thank you very much, Mr. Chairman. I would like first of all to thank you and your colleagues for the opportunity to appear before the committee today. You have a copy of the submission we are going to be presenting to you in front of you. It is not meant to stun you with its size. It is in large print and is double-spaced and I hope it will not take us too long to go through it. Our intention is really to read that into the record as our opening statement, with the understanding there would be an opportunity for questions subsequently.

Mr. Chairman: Please go ahead.


Dr. Cameron: Before beginning my remarks, I would like to introduce Don Stevenson. This seems singularly inappropriate; I think Don Stevenson should be introducing me because I think he has become known to a great many of you during his career here in the Ontario government. He is currently, as you know, Ontario's representative to Quebec and the federal government and has had an opportunity to get a bird's eye view of many of the issues behind and surrounding the Meech Lake accord and constitutional discussion.

As you well know, he has formerly been Deputy Minister of Intergovernmental Affairs and has extensive experience in constitutional negotiations and a very thorough knowledge of Quebec. We have asked Don to participate in the presentation this morning and I will be turning the floor over to him subsequently, after I have made some opening remarks. I will then close with some remarks at the end.

As the first witnesses to address the select committee, Don and I hope to place the accord in its historical setting and to provide a perspective on the process of constitutional negotiations and reform. I understand that Ontario's Attorney General (Mr. Scott) will be invited to testify before this committee on the substantive aspects of the accord, including the legal impact of its specific clauses.

In a moment, Don will review the key historical events of the past two decades and attempt to convey our understanding of the context within which this accord was negotiated. I will then trace the origins of the specific constitutional amendments called for by the accord. ~~Sub-first~~

C-1020-1 follows



Mr. Cameron)

~~I understand that the Attorney General for Ontario, the Honourable Ian Scott, will be invited to testify before this committee on the substantive aspects of the accord, including the legal impact of its specific clauses.~~

1020

~~In a moment, Don Stevenson will review the key historical events of the past two decades and attempt to convey our understanding of the context within which this accord was negotiated. I will then trace the origins of the specific constitutional amendments called for by the accord.~~ First, I have a few initial observations on the importance of constitutional reform.

If there is a common theme to our remarks today it is this: the Meech Lake accord completes one stage in a continuing process of political and constitutional discussion that began in the mid-1960s. More specifically, Meech Lake represents an occasion when all of Canada's governments, federal and provincial, agreed to make the establishment of a satisfactory place for Quebec within Canada the central objective of constitutional discussion. This objective was achieved and thus the major piece of unfinished business left over from the 1980 to 1982 round of constitutional reform was completed.

Comme je viens de le dire, si l'on voulait donner un thème central à notre intervention d'aujourd'hui, on choisirait le suivant: L'entente du lac Meech permet de compléter le processus de discussion politique et constitutionnelle entrepris au milieu des années 60. Plus précisément, l'entente marque l'occasion où tous les gouvernements du Canada, fédéral aussi bien que provinciaux, se sont entendus pour centrer leur négociations constitutionnelles sur la nécessité d'accorder au Québec une place satisfaisante au sein du pays. Cet objectif a été atteint et, ce faisant, le Canada a réussi à compléter la tâche qui était restée inachevée lors des discussions sur la réforme constitutionnelle de 1980-1982.

The post-war period in Canada has been characterized by rapid social and economic change on a variety of fronts. As our country has matured, the political system, including the Constitution, has served to articulate and reconcile the many identities and priorities of a people in transition. The status of Canada's aboriginal peoples has re-emerged in recent years as a matter of pressing contemporary concern. Large numbers of immigrants have chosen Canada as their home, making this country an increasingly pluralistic and dynamic society. In addition, this has been a period of increased participation of women in the economic and political life of Canada.

Within this evolving community of Canadians, new identities and new social forces are woven into the earlier traditions of Canada as a country of distinct regions, two languages and predominantly European origins. Within this complex pattern, three forces have been especially significant in shaping public debate in the last several decades. Day-to-day intergovernmental relations and the recent phase of constitutional reform, reflect the interplay of these forces, as does the Meech Lake accord.

I am referring here to the forces of Canadian nation building, regionalism and English-French duality. Each of these three forces springs from the desire of Canadians to give expression to their individual identities and to the values of the communities to which they belong. We take a moment to define these here because that really provides a structure for the subsequent remarks that we are advancing.

Canadian nation building refers of course to our loyalty to the national institutions and symbols which characterize the nation as a whole, and provide the framework of Canada's diverse society. Regionalism is the identification of Canadians with the particular geographic area in Canada and its characteristic culture and values. It has found political expression in recent years chiefly through provincial governments.


Finally, duality has two aspects. It has a Canada-wide expression which promotes the co-existence of English and French linguistic communities throughout the country and it also refers to the recognition of the language, culture and institutions of Quebec, as a distinct community within Canada and as the foyer or the homeland of French-language civilization in North America.

Canada's post-war experience has shown the difficulty of maintaining a delicate balance between these forces. As our society evolves and new pressures arise, Canadians are then called upon to work together to reach a new accommodation. A measure of Canada's political health to date, is the degree to which the country has been able to accommodate the forces of nation building, regionalism and duality.

A major element of this accommodation has been constitutional in character. This is not surprising given the growing importance of the Constitution, not only in defining the scope of government powers and the rights of individuals, but also in providing a guiding statement of the fundamental values of our society. Canadians have shown increasing interest in their Constitution and in constitutional reform during recent decades.

~~The interest shown by Ontarians in the Meech Lake accord---~~

C-1025-1 follows



~~A major element of this accommodation has been constitutional in character. This is not surprising, given the growing importance of the Constitution not only in defining the scope of government powers and the rights of individuals but also in providing a guiding statement of the fundamental values of our society.~~

~~Canadians have shown increasing interest in their Constitution and in constitutional reform during recent decades. The interest shown by Ontarians in the Meech Lake accord and, indeed, in these hearings, suggests that public involvement in a living Constitution will continue to be a feature of the politics of our society.~~

The accord is set in the complex evolution of post-war Canadian history, then. While the Meech Lake accord does not attempt to address the full range of constitutional issues, it is nevertheless the culmination of a major period in our constitutional evolution which saw the attempt, commenced in 1967, to define Quebec's place in the federation and to achieve a just balance in Canada among the three forces that I have indicated.

I now am going to turn the floor over to Don Stevenson. He will review the historical events and intergovernmental negotiations which led to the 1987 accord and look as well at the significance of the accord for the government and the people of Quebec. I will call on Don Stevenson to continue.

Mr. Stevenson: Thank you very much. I should add, Mr. Chairman, for the benefit of the committee, that David himself is no stranger to constitutional affairs. Ten years ago I had a fair bit to do with him when he was the research director of the Pepin-Robarts commission, so you might keep in mind that he is not a neophyte.

I would like very much to thank the select committee for the opportunity to appear today. As you know, Mr. Chairman, I have worked in the field of federal-provincial and Ontario-Quebec relations for quite a considerable time here. At present, I serve as the Ontario government's representative to Quebec and the federal government.

I am therefore pleased to be able to share with the select committee my sense of the historical developments in intergovernmental negotiations which led to the accord and to report to the committee some of the feelings and reactions which Quebecers have expressed concerning the accord.

In his opening remarks, David Cameron discussed the changing nature of Canadian society during the post-war period and referred to three political forces which have had a particular impact on our constitutional development. These are nation-building, duality and regionalism. My remarks today will deal with the two major constitutional agreements of this decade, the 1981 agreement among Prime Minister Trudeau and all of the provincial premiers but Quebec, and the 1987 agreement at Meech Lake, in the context of these forces.

The essential point of my remarks is that the agreement to entrench the Constitution Act, 1982, with an amending formula and Charter of Rights gave constitutional expression to Canadian nation-building, to the strong regional

identities of Canada and to the pan-Canadian aspect of duality--that is to say, the entrenchment of protection of language rights in national institutions and in provinces.

Ironically, however, the 1982 amendments did not address adequately Quebec's place in the federation, which was the driving force behind the current phase of constitutional discussions, which began in the 1960s. The Constitution Act, 1982, despite its important achievements, did not deal with some critical tensions and divisions in this country. The Meech Lake constitutional accord is, as has been said, an attempt to deal with this unfinished business.

La Loi constitutionnelle de 1982, avec sa formule de modification et sa Charte des droits, a permis de donner une expression constitutionnelle au concept du développement de la nation canadienne, de même qu'au sentiment d'identité régionale et à l'aspect pancanadien de la dualité, c'est-à-dire la reconnaissance et la protection des droits linguistiques au sein des institutions nationales et provinciales.

Mais les amendements de 1982 n'ont pas su répondre radicalement à la question de la place réservée au Québec dans la fédération, question qui constituait le moteur du débat constitutionnel entrepris depuis les années 60. Malgré ces importantes réalisations, la Loi constitutionnelle de 1982 ne parvenait donc pas à soulager certaines des tensions qui divisaient le pays. Or, l'entente du lac Meech, elle, se veut une façon d'achever cette tâche.

The desire to patriate the Canadian Constitution and to institute a formula whereby the Constitution could be amended here in Canada is not, of course, a new idea. Canadians have sought to enshrine the elements of full national sovereignty through constitutional reform for at least the last 60 years. Most of these attempts ended in failure, however, because of concerns in the provinces, and Quebec in particular, that duality and regionalism were not reflected adequately in the constitutional proposals.

The phase of constitutional discussions which has culminated in the Meech Lake accord has its roots in the mid-1960s. During this period, Quebec nationalism was on the rise and--

C-1030 follows

was not reflected adequately in the constitutional proposals.

1030

The phase of constitutional discussions which has culminated in the Meech Lake accord has its roots in the mid-1960s. During this period Quebec nationalism was on the rise, and many Quebecers supported a major transfer of federal power to Quebec as the only acceptable alternative to independence. In 1965, the Royal Commission on Bilingualism and Biculturalism concluded that a crisis existed in Canada between the two linguistic communities and between Quebec and the rest of the country. Its report called for the protection of minority language rights and for a comprehensive set of reforms to the Constitution.

In response to the B and B report and the tense situation in Quebec, the then Premier of Ontario, John Robarts, convened the Confederation of Tomorrow Conference in 1967. I have a copy of the proceedings here for anybody who is interested. The conference addressed the report's proposals for bilingualism and the broader question of Quebec's place in the federation. The Ontario government's role in this conference was very much in the tradition of our historic nation-building partnership with the province of Quebec. The conference concluded with a declaration which called for a comprehensive constitutional review.

It is interesting to note that the same week that John Robarts and Daniel Johnson and their fellow provincial premiers were beginning the search for an accommodation at the Confederation of Tomorrow Conference, leading Quebec nationalists met at the Estates General of French Canada. That conference called for a constitutional solution involving virtual sovereignty for Quebec. Such proposals were typical of some of the radical calls for reform of the period and stand in contrast to the set of reforms agreed to by Premier Bourassa and the other first ministers at Meech Lake.

At the first federal-provincial constitutional conference in 1968, the federal government presented to the provinces a three-stage plan for reform. This plan anticipated much of the activity of the subsequent 20 years. It called, as the first order of business, for consideration of a bill of rights to protect the individual liberties of all Canadians. This would be followed by a review of the central institutions of federalism, after which attention would be given to adjusting the federal-provincial distribution of powers. The conference also considered the entrenchment of minority language rights as recommended by the report of the Royal Commission on Bilingualism and Biculturalism.

However, not all provinces agreed with this set of priorities and proposals. Quebec took the position that the first priority was adjusting the federal-provincial distribution of powers and the western provinces expressed opposition to some of the proposals for bilingualism. In addition, much of the conference was devoted to the issue of regional economic disparities, as was, I might say, the Confederation of Tomorrow Conference. Thus, no new accommodation was reached among the forces of nation building, duality and regionalism.

Little progress was made until the constitutional conference of February 1971. At this conference the outlines of an initial constitutional accommodation emerged, when Quebec agreed to lend its support to a new

amending formula and the entrenchment of human rights, in return for extended provincial powers in the area of social policy, I might add, as a first step.

In June 1971, at the Victoria conference, it appeared that a constitutional agreement was at hand. The Victoria Charter, which was accepted by all the first ministers, called for a formula for the patriation and amendment of the Canadian Constitution, the constitutional entrenchment of human rights, the entrenchment of language rights in all but the three westernmost provinces, a guarantee of three Quebec judges on the Supreme Court of Canada, a limitation on federal powers in the area of social policy, the repeal of the federal power to reserve or disallow provincial legislation and an annual conference of the first ministers.

Many of the elements of the Victoria Charter are to be found in the constitutional agreements of 1981 and 1987. The Constitution Act of 1982 patriated the Constitution with an amending formula, a Charter of Rights and guarantees of minority language rights. The Meech Lake accord proposes to guarantee Quebec's representation on the Supreme Court, clarify the federal government's spending power in areas of provincial jurisdiction and entrench first ministers' conferences.

As we all know, the Victoria proposals collapsed when Premier Bourassa returned home to face the strenuous opposition of Quebec nationalists. They objected to the failure of the Victoria Charter to deal with Quebec's historical concerns about the distribution of powers, particularly in the area of social security. Premier Bourassa rejected the Victoria Charter on June 23, 1971.

Attempts by the federal government to revive the process of constitutional reform met with limited success through the balance of the decade. The federal government's October 1974 speech from the throne, which called for a limited package of amendments, was

C1035 follows



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Attempts by the federal government to revive the process of constitutional reform met with limited success through the balance of the decade. The federal government's October 1974 speech from the throne, which called for a limited package of amendments including patriation and the Victoria amending formula, was opposed by Quebec because, like the Victoria charter, it did not include any adjustment of federal and provincial legislative powers.

This proposal was made once more by Prime Minister Trudeau at the 1975 first ministers' conference and in letters to the provincial premiers in March 1976, but the provinces insisted that patriation would be acceptable only as part of a package of comprehensive reform. At the annual premiers' conferences of 1975 and 1976, the positions of the provinces on patriation hardened.

At the conclusion of the Edmonton conference of August 1976, Premier Lougheed of Alberta informed Prime Minister Trudeau on behalf of the premiers that although patriation was desirable, it would not meet with provincial agreement unless the distribution of powers was altered to expand provincial jurisdiction with respect to culture, immigration, communications and taxation of natural resources. In addition, the premiers called for the limitation of the federal declaratory and spending powers, and direct requirement that the creation of new provinces be subject to the general amending formula.

In the Quebec election of November 15, 1976, the Parti québécois swept into power on a platform calling for sovereignty-association for the province. This was a tremendously significant event which raised a serious possibility that Quebec would secede from the Canadian federation. The election of the Parti Québécois brought home to many Canadians the need for new constitutional arrangements while making any real prospect of rapid constitutional reform more remote.

Two other events at the end of 1976 further complicated the immediate prospects for federal-provincial agreement on constitutional reform. British Columbia took the position that it should be defined as a separate region with a veto on constitutional change. In Alberta, the government withdrew its support for the Victoria amending formula which, by the way, was a formula that required regional support: two provinces in the west, two of the Atlantic provinces, plus Ontario and Quebec. The Alberta government instead called for unanimous provincial consent for constitutional amendments.

In 1977, Prime Minister Trudeau reaffirmed that patriation was his government's constitutional priority. In that year, his government appointed the Task Force on Canadian Unity, chaired by Jean-Luc Pepin and former Ontario Premier John Robarts. In January 1979, the task force unanimously recommended a wide-ranging constitutional reform package which focused on accommodation of regional differences and a new relationship of Quebec within Canada. Here is a copy of that one.

By 1978, the Trudeau government was determined to proceed with a package of constitutional reform, with or without provincial consent. In June, a white

paper entitled A Time For Action and a constitutional amendment bill known as Bill C-60 were introduced in Parliament. The white paper and the bill set out the federal government's intention to proceed with several aspects of reform that it believed to be within its jurisdiction.

Bill C-60 proposed the adoption of a Charter of Rights and Freedoms which would apply within federal jurisdiction with a provision for provinces to opt in, the constitutional protection of language rights, a mechanism for provincial participation in the appointment of Supreme Court of Canada judges, plus a guarantee of four places on the court for Quebec, and the replacement of the Senate by a House of the Federation, of which half the members would be appointed by the provincial governments and half by the federal government.

A first ministers' conference on the Constitution was held in November 1978. The provinces could not agree on the entrenchment of individual liberties and language rights in the Constitution, and expressed disapproval of the federal Bill C-60. The bill was then referred by the federal government to the Supreme Court of Canada for an opinion on its constitutionality. On December 21, 1979, the Supreme Court of Canada confirmed that the federal government's powers to amend the Constitution under the British North America Act were limited to matters which affected the federal government. In the court's opinion, several of the constitutional amendments proposed in Bill C-60 were outside the scope of the unilateral federal amending power, and the bill was therefore unconstitutional in these respects.

The Quebec referendum took place in the spring of 1980. We all know what a significant event the referendum was for the people of Quebec and Canada. During the campaign, Prime Minister Trudeau promised that he would respond to a "no" vote with an initiative to reform the Constitution and address the aspirations of Quebecers...

C-1040 follows.

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The Quebec referendum took place in the spring of 1980. We all know what a significant event the referendum was for the people of Quebec and Canada. During the campaign, Prime Minister Trudeau promised that he would respond to a "no" vote with an initiative to reform the Constitution and address the aspirations of Quebecers within a renewed federalism. Several provincial premiers, including Premier Davis of Ontario, echoed this theme.

On May 20, 1980, the Quebec electorate rejected the Parti québécois request for a mandate to negotiate sovereignty-association with Canada by a vote of 60 per cent to 40 per cent. Within three weeks, the first ministers met in Ottawa and mandated their negotiators to begin a new series of discussions on comprehensive constitutional reform. While considerable progress was made over the summer, no agreement was reached at the first ministers' conference held in September 1980. Again, the Prime Minister and the premiers were unable to find a satisfactory accommodation among nation-building, regionalism and duality.

After the failure of the September conference, the Trudeau government decided it would proceed with its constitutional agenda unilaterally. On October 2, 1980, the federal government tabled a constitutional resolution that would have patriated the Constitution with an amending formula, a Charter of Rights and protections for minority languages. All of the provinces, with the exception of Ontario and New Brunswick, opposed the unilateral federal action. The governments of Quebec, Manitoba and Newfoundland referred the federal resolution to their courts of appeal for an opinion on its constitutionality. These opinions were then appealed to the Supreme Court of Canada.

On September 28, 1981, the Supreme Court rendered its opinion in the patriation reference on national television. The Supreme Court upheld the legality of the federal resolution. However, the court also stated that the attempt to amend the Constitution unilaterally was unconstitutional in the conventional sense, because it lacked a substantial degree of provincial support.

This judgement had the effect of forcing the federal and provincial governments back to the bargaining table. At the historic constitutional conference of November 1981, the Prime Minister finally reached an accommodation with nine of the provinces on a reform package which included patriation of the Constitution with an amending formula, a Charter of Rights and Freedoms and protections for the two official languages. However, it was not agreed to by Quebec.

The Constitution Act 1982 was proclaimed by the Queen in a celebration in Ottawa on April 17, 1982. It confirmed Canada's full independence by removing at last the anachronistic requirement of returning to Westminster to amend the Canadian Constitution. The 1982 Constitution reinforced the national identity of Canadians by providing a statement of our national ideals in the Charter of Rights and Freedoms. The charter not only protected Canadians'

individual liberties from oppressive state action, but recognized and reinforced the rights of women, the aboriginal peoples and the multicultural nature of Canada. It also provided protection for the two official languages of Canada.

It also addressed the Canada-wide dimension of duality by providing protection for the two official languages of Canada and for minority-language education rights.

The compromise struck by the first ministers also addressed the issue of regionalism in Canada. The act included an amending formula which recognized the principle of equality among provinces, a provincial right to opt out of constitutional amendments transferring provincial powers to the federal government, a requirement for unanimity to amend the Constitution with respect to a short list of national institutions, and a right of governments to declare legislation operative notwithstanding certain provisions of the Charter of Rights and Freedoms.

Thus, the 1982 amendments gave constitutional expression to nation-building, regionalism, and to the Pan-Canadian aspect of duality. They also recognized aboriginal and sexual equality rights and the multicultural nature of Canadian society. However, the amendments did not address the central question of Quebec's place within Canada. On April 17, 1982, flags in Quebec were flown at half mast. In the eyes of many Quebecers, the new amending formula arbitrarily took away the historical constitutional veto of the government of Quebec and subjected Quebec's future place in the federation to the discretion of the other provinces.

The Canadian Charter of Rights and Freedoms was viewed as stripping the provincial government of its full powers to protect the French language and culture in Quebec and as subjecting provincial legislation to a set of federally imposed standards.

Furthermore, the 1982 package of amendments did nothing to address Quebec's desire to be recognized as a distinct society, nor did it deal with the province's long-standing concerns about the distribution of powers in areas such as immigration...

C-1045--1 follows



the other provinces. The Canadian Charter of Rights and Freedoms was viewed as stripping the provincial government of its full powers to protect the French language and culture in Quebec and as subjecting provincial legislation to the test of federally imposed standards.

Furthermore, the 1982 package of amendments did nothing to address Quebec's desire to be recognized as a distinct society; nor did it deal with the province's long-standing concerns about the distribution of powers in areas such as immigration and the federal spending power.

The changes to the powers of the Quebec government were imposed on the government of Quebec without its consent. Even though the changes were legally binding, some residents of that province viewed them as illegitimate. Thus the constitutional reform of 1982 did not adequately reflect the values and aspirations of a significant part of the Canadian population residing in Quebec. Although it was a tremendous act of nation-building for most Canadians, the 1982 reforms did not bring the Québécois community into an accommodation with the rest of the country.

The Quebec government felt betrayed and disillusioned after the events of 1981 and 1982, and refused to participate in the federal-provincial conferences of the early 1980s and mid-1980s. The isolation of Quebec had a highly detrimental effect on the conduct of intergovernmental relations during this period. For example, one impact of Quebec's absence from the constitutional bargaining table was to reduce significantly the chances for success of the series of first ministers' conferences on aboriginal rights. Without Quebec's support, it was much more difficult to achieve the necessary consensus for an amendment guaranteeing aboriginal self-government. In addition, the Parti Québécois government systematically invoked the "notwithstanding" clause to suspend the protections of the Canadian Charter of Rights and Freedoms in respect of all its legislation.

In the federal election of September 1984, Prime Minister Mulroney won a large majority in the House of Commons. During the campaign, he promised a new effort to reform the Constitution and bring Quebec back into the Canadian family.

The defeat in December 1985 of the Parti Québécois government by Robert Bourassa's Liberals created the conditions for an accommodation with Quebec. The Liberal Party also campaigned on a commitment to restore Quebec's role and stature in the federation through a program of constitutional reform. The main elements of the reforms proposed by the party included recognition of the duality of Canada, guarantees for Quebec's cultural security and an updating of the federal system to take into account Quebec's interests with respect to the Supreme Court, the Senate and the distribution of powers.

In a symposium held at Mont-Gabriel in May 1986, Quebec's Minister Responsible for Canadian Intergovernmental Affairs clarified Quebec's requirements for adherence to the constitutional settlement of 1982. Quebec's proposals were recognition of Quebec as a distinct society; a greater provincial role in immigration; a provincial role in appointments to the Supreme Court of Canada; limitations to the federal spending power; and restoration of Quebec's veto on constitutional amendments.

McGillivray

C-1045-2

15

February 2, 1988

At the annual premiers' conference held in Edmonton in August 1986, the provincial premiers unanimously declared in their communiqué that the first priority for constitutional reform was to commence federal-provincial negotiations on the basis of Quebec's constitutional proposals, after which discussions would proceed on other issues including Senate reform and fisheries. This agreement to hold a Quebec round of discussions, based on its five conditions, was confirmed in a communiqué by all 11 first ministers at the November 1986 first ministers' conference in Vancouver.

During the ensuing winter and spring, a series of bilateral discussions were held across the country between federal and Quebec negotiators and their provincial counterparts in order to prepare first ministers for their upcoming discussions.

At the meeting at Meech Lake on April 30, 1987, the first ministers reached a unanimous agreement in principle, based on Quebec's five proposals, which was then released to the public. During May, governments consulted constitutional experts both within and outside the public service on the appropriate legal wording for these principles. The Prime Minister and the premiers met again on June 2 and 3 to agree on a final draft and reached agreement on the text of the constitutional accord which is before the members of this committee.

This accord was made possible by the first ministers' earlier agreement to postpone consideration of other constitutional issues in order to focus attention on Quebec's five conditions. It represents an integrated set of proposals which permit Quebec to play once again its full role within Confederation. It builds on the lengthy period of constitutional discussions which began in the late 1960s and recaptures the opportunity which was lost in 1982 to address the historical concerns of Quebec and its place in the Canadian Confederation.

C-1050 follows



(Mr. Stevenson)

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1050

I want to close my remarks today by highlighting the tremendous interest and emotional stake which the Québécois have in the 1987 constitutional accord. This impression has been constantly reinforced in my discussions with Quebecers in my capacity as Ontario's representative to that province. I offer the following observations by way of a report on the accord and its status and impact in Quebec:

First, in the period leading up to Meech Lake, there was a considerable debate between government spokesmen on the one hand and Quebec nationalists on the other, the latter claiming that the five conditions Quebec had put forward for an accord were not strong enough and did not sufficiently reflect Quebec's traditional claims for distinctiveness or autonomy.

Second, there was scepticism in Quebec a year ago that an agreement could be reached at all, given the history of failure to accommodate Quebec's concerns and the statements that had been made by political leaders of some of the other provinces criticizing aspects of the five points.

Third, the mainstream of Quebec opinion in the last two or three years turned away from constitutional matters to a preoccupation with economic affairs. Nevertheless, a strong feeling of bitterness remained. An impression had been created in Quebec that the 1981 constitutional agreement was an occasion when the rest of the country had excluded and even betrayed Quebec.

Fourth, when it was announced that an agreement had been reached at Meech Lake the sense of relief in Quebec was palpable. Many opinion leaders supported it because, for the first time, a constitutional arrangement had been found that recognized a distinct place for Quebec within Canada. The opposition party in Quebec criticized the accord for not going far enough and other groups were very sceptical about whether the wording would provide the degree of distinctiveness for Quebec that its proponents have claimed. In fact, the majority of the submissions made to the Quebec National Assembly, which reviewed the Meech Lake accord last May, stated that further guarantees for Quebec were still needed.

Fifth, Quebecers generally assume that a formal deal has been reached by virtue of the signature of the 11 first ministers. The Quebec government has indicated that the current agreement is a package designed to permit Quebec's adherence to and participation in the Constitution and in future constitutional discussions. There is a commitment by the Quebec government to deal seriously with the constitutional concerns of other governments and with other groups in subsequent constitutional rounds following the formal ratification of the 1987 accord.

Let me close my remarks by quoting one Quebecker, Solange Chaput-Rolland, a member of the Pepin-Robarts commission, who said in 1987, and I quote:

"Inside Quebec, seven years ago, we decided that Canada was our country. We have yet to find out whether our loyalty was well placed. Frankly, in 1982 I wondered if the agonies, the pains, the quarrels, the bitterness following the referendum had been necessary. We voted for Canada; Canada, through its central government totally absorbed in its will to patriate the British North America Act of 1867, cared very little about those who had openly stated their will to remain linked to this country. Promises and dreams were shattered; not a single Québécois will want to go through such emotions again. You English-speaking Canadians have asked during years: What does Quebec want? Now you know. It has been described in five proposals not written by constitutionalists, jurists or nationalists, but by men duly elected by 'We the people.'"

I will now return the floor to David Cameron.

Dr. Cameron: Thank you. You will have a change of speaker, if not a change of pace.

What I am going to do now is turn to the 1987 constitutional accord itself and address myself to two matters in particular. First, I would like to review the process for the ratification of the 1987 constitutional accord, as set out in the political agreement and the resolution which constitute the preamble to the accord. Second, I would like to identify the origins of the main elements of the accord and describe how each is a response to the historical needs of Quebec and reflects the concerns of the other provinces and the federal government.

The 1987 constitutional accord is composed of three parts, as you know: A political accord, which sets out the undertakings of the federal and provincial governments under the accord; a constitutional resolution, which each government has agreed to place before its Legislature in order to introduce the proposed constitutional amendments, and a schedule of constitutional amendments, which forms the major part of the accord itself.

~~Under the first, the political accord,~~

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The 1987 constitutional accord is composed of three parts, as you know: a political accord, which sets out the undertakings of the federal and provincial governments under the accord; a constitutional resolution, which each government has agreed to place before its legislature in order to introduce the proposed constitutional amendments; and a schedule of constitutional amendments, which forms the major part of the accord itself.

Under the first, the political accord, the first ministers make a commitment to lay before Parliament and the legislative assemblies, as soon as possible, the resolution calling for amendments to the Constitution of Canada. As you know, the government of Ontario tabled a resolution before the Legislative Assembly on November 25, 1987.

The resolution itself then recites that certain of the specific constitutional changes proposed in the schedule require unanimous federal and provincial support under the amending formula of 1982. The constitutional resolution therefore invokes the unanimity procedure for amending the Constitution under section 41 of the Constitution Act, 1982. For the amendments to take effect, the resolution and the schedule must be passed in identical form by Parliament and the House of Commons and by the Legislative Assembly of each province.

Of course, each Legislature retains the power to approve or reject the accord or to pass it with amended wording. If this were to occur, if changes were to be proposed by any Legislature and the first ministers were able to agree upon new wording, all resolutions passed prior to that date would have to be passed again with the agreed-upon amendments.

So far, the accord has been passed by the Quebec National Assembly, the Saskatchewan Legislature, the House of Commons and, most recently, the Alberta Legislature. Three of the remaining provincial legislatures will hold public hearings before submitting the accord to a vote. These are the legislative assemblies of Ontario, New Brunswick and Manitoba.

The Senate can reject, fail to pass or alter the schedule of amendments. However, six months after passage by the House of Commons—that is to say, as of April 27, 1988—the House may repass the resolution and schedule in its unamended form, and it will be proclaimed by the Governor General despite the lack of approval by the Senate. So far, the Senate has held hearings in Ottawa and the north, but it has not yet debated the accord.

If Parliament or any of the provinces has not passed the resolution and schedule by June 23, 1990—that is to say, three years from the date of passage by the first assembly, Quebec, the first one to pass the resolution and schedule—then under section 39 of the Constitution Act, 1982, the process expires and the amendments cannot be proclaimed without beginning the whole process anew.

I now will consider the origins of the main clauses of the 1987 constitutional accord and how each responds to the historical needs of Quebec and meets the concerns of the federal government and the provincial governments.

Section 1 of the accord is an interpretation clause which provides that the Constitution of Canada shall be interpreted consistently with two fundamental characteristics of Canada: firstly, the reality of linguistic duality in Canada, and secondly, the fact that Quebec constitutes within Canada a distinct society. The clause also affirms the role of Parliament and all provincial legislatures, including Quebec, to preserve Canada's linguistic duality, and the particular role of the Quebec National Assembly to preserve and promote Quebec's distinctive character.

The recognition of Quebec's distinct character in the Constitution is not entirely new. The Constitution already protects the distinct nature of Quebec's justice and education systems and the use of the French language in Quebec government institutions and courts. Proposals to recognize explicitly Quebec's distinct society have also been made during the most recent period of constitutional reform. In 1979 the Pepin-Robarts task force on Canadian unity proposed the explicit recognition of Quebec's distinct society as part of the solution to the constitutional impasse of the late 1970s, as did the beige paper, as it was called, of the Quebec Liberal Party in 1980.

The distinct society clause, as it has come to be called, is a cornerstone of the 1987 constitutional accord. It gives constitutional recognition to the distinct nature of Quebec, defined by Pepin and Robarts in terms of history, language, law, common origins, aspirations and politics.

However, in recognizing Quebec's distinct character, the first ministers were careful not to diminish the pan-Canadian aspect of linguistic duality, which each government is mandated to preserve. In addition, section 16 confirms that the rights of aboriginal peoples and the multicultural nature of Canada, as recognized in the constitution acts of 1867 and 1982, are not affected by the distinct society clause.

Section 2 of the constitutional accord introduces a new process for filling vacancies in the Senate. The new provision gives provinces the right to participate in the appointment process by submitting lists of nominees, from which the federal government will pick a name to , , ,

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(Dr. Cameron)

... confirms that the rights of aboriginal peoples and the multicultural nature of Canada, as recognized in the Constitution Acts of 1867 and 1982, are not affected by the distinct society clause.

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Clause 7 of the constitutional accord introduces a new process for filling vacancies in the Senate. The new provision gives provinces the right to participate in the appointment process by submitting lists of nominees, from which the federal government will pick a name to submit to the Governor General. This mechanism is, however, intended to be temporary, pending more comprehensive Senate reform.

Proposals for Senate reform have been made for a number of years. There are a variety of such proposals based on different appointment mechanisms, powers, and methods of representation. For example, the federal government proposed in Bill C-60, as I think Don Stevenson indicated, to establish a house of the federation in which half of the senators would be appointed by the provincial governments and half by the federal government. The Ontario advisory committee on Confederation and the Pepin-Robarts commission recommended a house of the provinces, not unlike the second chamber in West Germany. More recently, the government of Alberta has expressed its support for an "equal, elected and effective" Senate, the so-called triple-E Senate.

Virtually all of these proposals call for a Senate which better fulfils the function of representing the regions in national government and decision making. The proposal for a joint nominating process in clause 2 of the Meech Lake accord is an interim measure, while clause 13 specifies that more comprehensive Senate reform will be the first item for the next round of constitutional discussions.

Clause 3 of the 1987 accord would permit the provinces to enter into agreements with the federal government respecting immigration, which is a subject of concurrent federal and provincial jurisdiction. These agreements could then be constitutionally entrenched, but would be subject to the mobility provisions of the Charter of Rights and Freedoms.

Since 1978, Quebec has had an immigration agreement with the federal government known as the Cullen-Couture Agreement. This guides federal immigration policies so as to make them more sensitive to Quebec's historical concerns in this area. Quebec is, of course, concerned about immigration because of its impact on the unique French character of the province, and its importance in maintaining Quebec's percentage share of the overall Canadian population.

The Supreme Court of Canada has been another consistent subject of proposals to amend the Canadian Constitution. This is a reflection of the crucial role the court plays both as a final court of appeal and the forum for determining constitutional questions respecting the Charter of Rights and the federal-provincial distribution of powers.

Clauses 4 to 6 of the accord would affirm and entrench the Supreme Court of Canada as the final court of appeal for Canada. They would also guarantee at least three places on the Supreme Court for Quebec justices, in order to

ensure that the court is fully competent in Quebec civil law. The latter amendment would constitutionalize the existing requirement for at least three Quebec judges which is currently found in the present Supreme Court Act. The proposal to provide such a constitutional guarantee was made in both the Victoria charter of 1971 and in the federal Bill C-60 of 1978.

The accord also calls for a new mechanism for the appointment of Supreme Court judges. The mechanism is similar to the one proposed for the appointment of Senators; provinces would submit a list of nominees from which the federal government would pick an acceptable candidate. This amendment is intended to ensure that the final arbiters of federal-provincial jurisdictional disputes are appointed after a process of consultation and co-operation between the two levels of government, rather than unilaterally by the federal government. Again, the proposal to involve the provinces directly in Supreme Court appointments is not new; such a proposal was included in the Victoria charter of 1971.

Clause 7 deals with an aspect of the federal spending power; namely the power to establish national shared-cost programs in areas of exclusive provincial jurisdiction. This clause would permit provincial governments to opt out of new national shared-cost programs with financial compensation, so long as the province implements a program of its own which is compatible with the national objectives. The clause also provides the first explicit constitutional recognition of the spending power and affirms the federal right to set national objectives in areas of exclusive provincial jurisdiction.

This proposed clarification of the spending power responds to the concern of Quebec and the other provinces that the power distorts the federal-provincial distribution of legislative competence under the Constitution Act, 1867. During the 1968 to 1971 constitutional review process, the federal government itself proposed that use of the spending power in the social policy field be subject to provincial approval.

Clauses 9 to 12 modify the constitutional amending formula in the Constitution Act, 1982. The first change is to require unanimity to amend some matters which . . .

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(Mr. Cameron)

of legislative confidence under the Constitution Act of 1867. During the 1965 to 1971 constitutional review process, the federal government itself proposed that the use of spending power in the social policy field be subject to provincial approval. Clauses 8 to 12, modified the constitutional amending formula in the Constitution Act of 1982. The first change is to require unanimity to amend some matters which formally fell under the less stringent general amending formula. These include amendments respecting the House of Commons, the Senate, the Supreme Court of Canada and the establishment of new provinces, all matters which fundamentally affect the nature of the federation.

This change responds in part to one of Quebec's five constitutional concerns, namely the restoration of its traditional veto and at the same time preserves the essential principle of equality of provinces which was established in the 1982 amending formula and which was insisted on by a number of provinces. The list of matters for which unanimous approval would be required, is limited and the amending formula remains more flexible than in some previous proposals, such as the Fulton-Favreau formula of 1964.

The second change is to broaden the provincial right under the Constitutional Act 1982 to opt out of constitutional amendments which transfer provincial legislative powers to the federal government. However, there is no change to the basic constitutional amending formula which applies to most matters, namely the approval of Parliament and two thirds of the Legislatures representing 50 per cent of the Canadian population.

Finally, clauses 8 and 13 of the accord enshrine annual First Ministers' conferences on the economy and the Constitution. Clause 13 also provides that the constitutional conferences shall address the issues of senate reform, fisheries and other matters as are agreed upon by the First Ministers.

First Ministers' conferences have, of course, been a fact of Canadian political life for many years. They are a result of the need in a federal state for an ongoing process of intergovernmental dialogue and action. The entrenchment of First Ministers' conferences was proposed in the Victoria Charter of 1971. The Constitution Act 1982 provides for a constitutional conference within 15 years to review the 1982 amending formula. In addition, section 37 of that act, which was added in 1983, provided for a series of conferences on aboriginal issues.

The entrenchment of First Ministers' conferences in the Constitution Act 1987 will ensure that economic issues of national concern are dealt with in a co-operative intergovernmental forum, and that adjustments to our constitutional arrangements are addressed as they from time to time become necessary.

Don Steveson noted during his presentation that the Meech Lake negotiations were made possible because of an agreement among the First Ministers to set aside temporarily other constitutional concerns in order to address the Quebec issue as a first priority. The inclusion of annual constitutional conferences in the accord reflects the commitment of the First Ministers to proceed with other questions after the completion of the Quebec round.

As the next order of constitutional business, the First Ministers have agreed to discuss senate reform, as I have said, which is a matter of considerable importance, particularly to western Canadians and the western

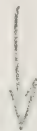
provincial governments. They have also agreed to address the question of roles and responsibilities in relation to fisheries, which is a concern to Newfoundland. In addition, the annual constitutional conferences will provide a forum for the discussion of other constitutional issues of importance to Canadians.

Mr. Chairman, I began my remarks this morning by looking back at the historical process of adjustment in Canada and the interplay among the forces of Canadian nation building, duality and regionalism. I suggested that the recent phase of constitutional reform can be characterized as part of an ongoing search for a balanced expression of these forces, within a broader context of other emerging values and identities which are also increasingly seeking constitutional recognition.

One of the most significant challenges for federalism has been the search for an arrangement which would address the needs of French-speaking Quebecers as a distinctive cultural and linguistic community within confederation. The current series of constitutional negotiations began in 1967 because Ontario recognized the importance for Canada of finding an acceptable accommodation with Quebec. As indicated by Don Stevenson, the irony of the 1982 constitutional arrangements, is that nation building, regionalism and the Pan-Canadian aspect of duality, were all addressed in the Constitution, but the initial objective of dealing with Quebec's status was not achieved.

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En résumé, l'accord constitutionnel de 1987 a le mérite de répondre au problème de la place accordée au Québec au sein de la fédération. L'assentiment unanime des premiers ministres et la sanction de l'entente par l'Assemblée nationale du Québec constituent des étapes historiques de très grande importance pour le Canada. Elles n'ont été rendues possibles que par la volonté des autres provinces de mettre leurs propres revendications constitutionnelles de côté afin d'accommoder le Québec. L'entente marque donc la fin de l'ère des réformes constitutionnelles préoccupée par la dualité.

Just in summary, the accomplishment of the 1987 constitutional proposals is that they finally address the question of Quebec's place in the federation. The unanimous agreement among the first ministers and the acceptance by the Quebec National Assembly of this package of amendments is an event of signal importance in Canadian history, made possible by the willingness of other provinces to set aside their own constitutional issues in order to get the Quebec government back in.

The accord thus marks the conclusion of the phase of constitutional reform which was preoccupied with duality. But while the Meech Lake accord marks the conclusion of one phase, it is clear, both in the commitments the accord itself makes and in the constitutional discussions that are going on, that it marks the beginning of another, and it seems certain that the interest in constitutional interests which Canadians are demonstrating will continue in the future.

So conclude our remarks. I would like to seek the forgiveness of the committee for the length of this presentation, and also for what one of my staff called a fog index of 18 for this submission. As you know, when civil servants appear in public, the main purpose is for them to be as boring as possible. I hope we have not entirely succeeded.

Mr. Chairman: Thank you very much. That was certainly a very complete overview of the historical context, and I think it met very well the request that we had made. It was not at all boring but I think was very helpful and useful as we begin our own reflections on the accord.

Mr. Allen: Let me say first of all that it is with a sense of the great significance and importance of this committee that we launch our first questions to our first presenters. I think it is even with a certain sense of excitement about the role that this committee has been given by the Legislature, and indeed by the Meech-Langevin decisions themselves that there shall be legislative participation in the process. I guess this is really the first substantial role the legislative committees have undertaken in constitutional affairs in this country. It looks as though, since this has become a national enterprise—namely, constitution-making, which goes on without end—we will be in this position many times in the future.

Mr. Allen

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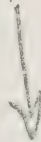
February 2, 1988

I want to say, secondly, that naturally, as representatives from constituencies in Ontario and from Ontario parties, we address the question of the Quebec round of discussions with a sense of the unique significance of that occasion and recognize the importance of the nation-building process that we are in, given the historic relationship that Quebec and Ontario have had, the central and formative roles in constitution-making in the past.

In my first question, I want to ask about the process itself. Perhaps the question is a little bit academic, and yet I think it is important for us to have a sense of the propriety of what we are doing and of its efficacy. We appear to be in an ongoing discussion in which we move from item to item on the constitutional agenda, not having managed to embrace everything in one fell swoop in 1981-82.

From your position of involvement in the debate, I wonder whether you see major problems in that simple fact. We look at aboriginal rights, but at that point in time we are not talking about Quebec, we are not talking about women, we are not talking about regions; and yet there are always implications for all the other elements as we do that. Now we move to the Quebec...

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February 2, 1988

I wonder, from your position of involvement in the debate, whether you see major problems in the simple fact that we look at aboriginal rights, and at that point in time we are not talking about Quebec, about women, about regions, and yet there are always implications for all the other elements we would have. Now we move to the Quebec issue and we inevitably leave to one side a whole series of other considerations.

From your experience, I wonder whether you have any cautions for us as we enter that kind of constitutional process and whether you think we might perhaps be very reserved in the kinds of judgements we make in each of these stages so that future adjustments might be made in the light of future decisions. In other words, how permanent can decisions so discrete be made in a constitution-making process like this?

Dr. Cameron: Whatever one may think personally of it, I think you are correct that it looks like constitutional discussions will continue to be a fact of life in our society as far into the future as one can see at this juncture. As well, I think your identification of the process the country employs to address those matters is important and needs attention.

I do not have any pat solutions for it, but I think that there are clearly areas of that sort that need the concern of a committee such as this and of Canadians generally. My observation, I guess, may surprise you a little bit when you talk about the seriatim approach to constitutional reform. One of the things I perceived really causing problems, one of the reasons there was a blockage during the 1970s and early 1980s, it seemed to me, was that in the discussion, which began initially focusing on Quebec and started out in the late 1960s, more and more people got a taste for constitutional issues and more and more constituencies and especially other governments began to think: "Don't we have an interest that has a constitutional expression? If so, why is that not on the table along with the concerns of Quebec?"

As you went through the 1970s, what happened was that more and more people climbed on board the constitutional bandwagon and you reached a point where a settlement had to be bigger and bigger and bigger because there were more interested participants in it. It was very difficult at that stage to get people to agree that we would start with the Quebec reality and address that and then turn to other matters.

I think that was a major factor behind the difficulty the country had in reaching a constitutional settlement in the 1970s and early 1980s. One of the interesting features of this process, and we draw attention to it in our remarks, is the explicit agreement and undertaking on the part of the nine provincial premiers and the federal government to say, "This is essentially the Quebec round and that is really its essential character, which is not to say we will not get back to other things."

There are advantages in a seriatim approach to constitutional reform, I think, particularly if we can fashion for ourselves a process that allows all the interested participants to have their voice. That is perhaps the way in which you can ensure the impact of the given reform proposed is what you intend and not something you do not intend.

In this round and the 1982 round I thought: "Thank God, we are now able to start dealing with it on a normal basis. If we have a problem, let's fix

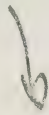
it. If we do not have a problem, let's leave it alone." Those would be my initial comments on it.

Mr. Stevenson: I wonder if I could add just an extra thought or two. It is very interesting to see how we are moving into a totally new phase. There was quite a feeling from the 1960s that we should be starting from scratch, so a number of the reports I have referred to here really are an attempt to provide the framework for a new global constitution.

What 1982 and 1987, completing the 1982 round really, does is to give a base on which you can now add each year. The Meech Lake accord provides for a constitutional conference every year. It may be just for five minutes if there is nothing on the agenda, but it provides a totally new opportunity for groups to deal with single potential amendments.

The other thing that bedevilled all governments in the 1960s and 1970s was the assumption—

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(Mr. Stevenson)

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~~The other thing that bedevilled all governments in the 1960s and 1970s was the assumption that you could not change without unanimity. One of the great advantages of the 1982 constitutional accord, carried on for the major part into the Meech Lake accord, is that the general amending formula is just seven provinces plus 50 per cent. That will make amendments seriatim easier in the future.~~

1120

I think there is also an assumption that there will be less Constitution making solely through the process of executive federalism, behind closed doors of government representatives. The Charter of Rights has given a new interest for all sorts of groups in the impact of the Constitution which will find their way directly to legislatures at all levels of government.

I think that this series of hearings you are going to have will be enormously valuable in the development of that ongoing series of constitutional meetings that are being proposed. There is no question that there are a lot of issues that impact on other groups which have not been touched by this round but which will need to be addressed as the new conferences are held each year.

Mr. Chairman: I wonder if I might follow up on that point. In the Roberts Confederation of Tomorrow Conference and, as you say, in the first phase from 1968 to 1971, there was an attempt to try to deal with a pretty broad range of subjects. If I recall, in certain areas, different working groups that were set up, progress was made in some areas, but it was always difficult to move on one front.


To what extent would you say that the Pepin-Robarts exercise and that report was in a sense, if you like, the parent of Meech Lake? At the time, that report did not receive, if I recall, a great deal of support, yet it raised a number of issues which there were difficulties in dealing with in the 1981-82 period and which have come back. You touched on that in the document, but I wonder if you could expand a bit on that particular report and its relationship to what we are looking at today.

Mr. Stevenson: Dr. Cameron says he refers that one to me, although when it comes down to the details of Pepin-Robarts, he is the expert. My own sense is that the Pepin-Robarts document is very important philosophically as a base for this particular round. The 1982 agenda was essentially that of the federal government of the day, with the Bill of Rights as the centrepiece, and the amending formula obviously was something that all the governments, particularly the English-speaking provinces in Canada, were concerned with.

I see a trend of parallel with the Ontario Advisory Committee on Confederation, for example, which started using some of the same philosophical bases as the Pepin-Robarts commission. There was a great deal of similarity too in the beige paper of the Quebec Liberal Party, which again found some of its recommendations directly in the Quebec propositions of 1987. I think if you look at those four documents, you will find a great deal of similarity. So there is very much an historical forerunner.

The attempt by the Quebec government to set out the five conditions was something that was to pick the five areas that the Quebec government felt would be easiest of accommodation by the rest of the country but which also touched some traditional Quebec and Canadian concerns as represented by those earlier reports. What it does not do is touch the long list of distribution-of-powers exercises, which we went through in the 1960s, 1970s and early 1980s. However, we now at least have an amending formula that permits for more flexibility on distribution-of-powers issues than was the case in the 1960s and 1970s.

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(Dr. Cameron)

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Mr. Chairman: Mr. Breagh and then Mr. Cordiano.

Mr. Breagh: I just wanted to get one beginning concept put together. We have all had a chance to kind of ruminate a bit now on the wording of the accord and there are some different words used.

But I am really searching to find some new ideas in there. It seems to me that almost everything is something that has been discussed at one time or another previously—has been the practice, if not exactly the prescribed form. The only new thing that I can find in here is in fact the process.

I think, as most lay observers would say, it is a strange one indeed that has been used to date, that the Constitution of a country would be decided in private, behind closed doors and then formalized at a subsequent period and that now, across the country, there are legislative committees that are forbidden by the premiers to move amendments, but are urged to hold public hearings.

The only thing that I see that is new, and I would like to get your reaction to it, is that process. It appears to me that the opportunity is here now to rectify what seems to most Canadians, to be a very screwy process. That is that if there is now an opportunity to hold public hearings, identify needs, identify ways in which you might resolve those needs, these legislative committees would be in a position to say: "Well, OK. If you can't change this agreement, here is the priority for the next first ministers' conference. Here are some ideas that may be tried among the provinces and the federal government as to how to proceed."

But that process is really the only thing new that I can identify in the accord. I would like to get your response to that.

Dr. Cameron: Just to respond on the process issues that you have raised, I think that if you look at our history and the role of the Constitution in the past, its basic purpose was really to sort out the relationships in a federal state between the two orders of government, establish some kinds of mechanisms that will allow federalism to be conducted.

The logical manifestation of that in Canada has been executive federalism or the executives, the first ministers and ministers, working together to reach some kind of an accommodation on a particular issue.

I think that we are in, and have been for the past 20 years, a very substantial process of change. It is reflected in the Constitution, as it is reflected in other areas. I think the referendum in Quebec, setting aside the specific issue, was itself a mechanism that was, in our generation, fresh and new. It was a direct consultation with the people. That is not something that Canadians have gone for substantially.

So it, in its own way, I think also reflects this change which is that the society is much more participatory and much better organized. Individuals and groups are better organized to represent their concerns. The Constitution itself increasingly is reflecting values and rights of individuals and rights of communities, not simply the powers of governments.

So I see all of this cohering and pushing us in a direction. We are already embarked on this path, where increasingly, concerned Canadians have got to have a voice, and clearly the legislative branch of the government is extraordinarily important in giving tongue to those concerns, as one discusses the Constitution or any other significant issues.

So, again, without knowing exactly where that will take us as a nation, I think that is the course that we are embarked upon. I think a lot of scrutiny needs to be given as to how one can best do that.

I think the other point I would make is that we have tended historically to look at each constitutional initiative or attempt to reach a conclusion, as an act. We will do it and then, having raked the leaves for the fall, we can go away and we do not have to worry about it again.

I think now we are recognizing that it is not going to be over. That is both—I am not sure it is the healthiest thing in the world to spend your time talking about constitutions all the time. On the other hand, it does sort of leach out some of the unnecessary significance of any particular event or occasion, because it is part of a longer-term process and people will be returning to the table and discussions will prevail.

I guess that is the way I see 1982, which is now followed by 1987. In between that, there was an amendment relating to aboriginal arrangements, and what I see beyond 1987. It is an ongoing process and I think the issue you raise is a very ...

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~~... It does sort of leech out some of the unnecessary significance of any particular event or occasion because it is part of a longer term process and people will be returning to the table and discussions will prove I guess that is the way I see 1982 which was followed by 1987 and in between that there was an amendment relating to aboriginal arrangements. What I see beyond 1987 is an ongoing process and I think the issue you raise is a very important one.~~

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Mr. Stevenson: Perhaps I might add another element, too. I suppose the problems, from the point of view of MPPs, about 1982 and 1987 is that because they involved quite a few different elements, they became a delicately negotiated balancing act that became very difficult to change. However, I think in future, because we will not likely be moving on such a global manner, there is an infinite range now of possibilities as to how constitutional amendments can be achieved.

One way, which we have seen in the United States of course, is to have an amendment resolution passed in a single Legislature and then lobbying may take place by particular interested groups on other Legislatures, until you arrive at that magic figure of seven provinces plus the federal government on a particular amendment requiring that amending formula. That has not really been done in Canada, but it is very much a possibility with the 1982 amending formula.

I think if we get into big, global amendment packages, you cannot avoid the kind of late-night executive federalism bargaining sessions, but on single-issue amendments, I think this is very different, or one or two or three. I see a much greater role there for Legislatures, singly and collectively.

Mr. Harris: How do you answer the charge that the other provinces outside of Quebec accommodated the veto request by insisting, "That is fine; we all want one too"? Is that your assessment of what happened? That charge has been levied and I would think it would be difficult not to suspect that there was some of that among some of the provinces.

Dr. Cameron: I go back to the comment I made earlier about more and more governments and organizations getting interested in the Constitution and recognizing that it is significant for their life and fortunes. Consistent with that, there was a growing concern on the part of a number of provinces during the 1970s and into the 1980s, about the status of the provinces' and provincial governments' desire to have in some fashion entrenched or understood that provinces are equal and in that framework, concern to give Quebec a veto over amendments to the Constitution was to directly confront that issue.

If this is the thrust of your question, I would agree that what one had on the one hand was a deep concern on the part of Quebec that it had lost control, it had lost some capacity that it was understood to have had in the past that was summed up in the traditional assumption of its veto. You had that on the one hand and you had several other provinces finding it very difficult to entertain the proposition that this would be given to Quebec. I think the amending formula that was worked out was a way of trying to bring those two points of view together and it involves something of an expansion of the unanimity principle over certain critical areas. That gives Quebec its veto but it gives everybody else a veto over it as well.

Mr. Harris: So you would suspect that the main impetus to move in that direction was a fear or a concern that they could not sell back home in Ontario or in British Columbia or in Alberta that Quebec has a veto but we do not; that would be unsaleable back home.

Dr. Cameron: That I do not know.

Mr. Harris: I sensed that is what you said as to why they went that way.

Dr. Cameron: For a good period of time, on constitutional issues I think a number of provincial governments were leading, not following, public opinion in their province and sometimes raising issues that were a concern to them as governments that probably did not have a very sharp echo in the provincial population itself. So I think it is a mix of factors.

Mr. Harris: Was that Ontario's position?

Dr. Cameron: I am sorry, on the veto question?

Mr. Harris: Yes.

Dr. Cameron: In this case I have the position of not having been part of the government at that stage that came in in the fall, in October.

C-1135-1 follows



not following public opinion in their province and sometimes raising issues that were of concern to them as governments that probably did not have a very strong echo in the provincial population itself, so I think it is a mix of factors.

Mr. Harris: Was that Ontario's position?

Mr. Cameron: On the veto question?

Mr. Harris: Yes.

Mr. Cameron: In this case I am perhaps in the happy position of not having been part of the government at that stage. I came in the fall, in October.

Mr. Stevenson: Perhaps to put that one into a bit of historical context, most amending formulae that were put before governments up until the mid-1970s involved some combination of numbers of provinces plus a proportion of population, and almost all of these formulae that were put out in earlier global constitutional documents gave Ontario either a veto or something close to it because of the fact Ontario always had about 35 per cent of the population.

Thus the Victoria formula, which seemed to be the closest to acceptance and which was very close to formulae put forward in the 1920s and 1930s when we were first trying to patriate the Constitution, involved any province that had ever had 25 per cent of the population, which automatically included Ontario and Quebec, for a veto, plus two of the four Atlantic provinces plus two of the four western provinces containing, in total, at least 50 per cent of the western population. It could have been Alberta and British Columbia, or Alberta or BC and Manitoba and Saskatchewan.

As I think I said in my remarks, the Alberta government in 1975 rejected that element and BC at about the same time said: "We consider BC a separate region. We do not want to be lumped in with the west." This was picked up by some of the smaller provinces to the extent that by the time we got to the 1981-82 agreement, many of the smaller provinces, I think led by Alberta, felt that their great gain in the 1981-82 constitutional exercise was the principle that all provinces are equal in terms of an amending formula: Seven provinces, it did not matter what, although the 50 per cent of the population obviously would favour provinces with larger populations, and there was no veto in that for either Ontario or Quebec. This was the great criticism Mr. Bourassa put on the Lévesque government, that it gave up the Quebec veto even though it gained back the opting-out provision.

We were not able—I think any government in the last five years—to contemplate the old type of regionally based formula. We were in a situation where Quebec, as one of its five points, was concerned to have a veto at least over national institutions. One could consider the equivalent of a veto on distribution-of-powers issues being the power to opt out of amendments that would transfer power to the federal government, for compensation, which gives in effect a veto.

That was not accepted for Quebec alone by the other provinces, as being a derogation from their victory in 1981-82, so that very few, a limited

number, of national institution issues went to the unanimity—

Mr. Harris: I understand the history. I am sorry to interrupt, but all my question is is, was it Ontario's position that it would be advantageous for all provinces to have a veto? Was that the consensus of the provinces? Or was the motivating factor that Quebec had to have that, so we had to have it? That is all my question is.

Mr. Stevenson: For Ontario, I think we have always as a province, over the 1960s and 1970s, been prepared to live with almost any number of amending formulae and in fact there was probably some bias by the Ontario government in favour of formulae that were more flexible as opposed to closer to unanimity. It was largely pressure from other provinces that led to the type of formula we now have, and particularly to the every-province-is-equal exercise from 1981-82, as Dr. Cameron has mentioned.

Mr. Harris: I do not want to take all the time and perhaps I can come back, but in the same vein, there are a number of people who have criticized the accord on the basis that—I do not want you to pick apart my generalization as being too simplistic. I think the gist of the criticism has been, "Mulroney promised this and he has to come to a deal, so he will give away anything in order to get this deal." There are a number of people who have criticized the reaction of the provinces in that the other provinces, outside of Quebec, are saying: "Look, he is going to sit us down here until he gets a deal. He is prepared to give away anything and everything to get this deal. Let's get whatever we can."

C-1140-1 follows



(Mr. Harris)

pick apart my generalization as being too simplistic, but I think the gist of the criticism has been: "You know, Mulroney promised this. He has got to come to a deal so he will give away anything in order to get this deal." There are a number of people who have criticized the reaction of the other provinces outside of Quebec as well. He is going to sit us down here until he gets a deal. He is prepared to give away anything and everything to get this deal. Let us get whatever we can. Was that your sense? How do you answer that criticism?

1140

Dr. Cameron: My response would be, first, I can speculate as an individual but I do not know about the motivations of the Prime Minister on this score.

I think the central issue is assessing product. Is the product deficient, and radically deficient, with respect to that kind of concern? In other words, does the Meech Lake accord not attend to the national interest and the capacity of the national government to act on behalf of all Canadians? Has it really undermined the constitutional balance between the national government and the provincial governments? I think that is the critical question in trying to come to terms with the issue you are touching on.

Mr. Harris: I am trying to understand because, in the future, in order to change any significant parts of the Constitution, there must be unanimity and a lot of suspicion that you are going to have to buy unanimity. I am trying to ascertain at what price unanimity was bought at this conference, because that is probably what is going to happen. You were not there, so I do not know whether Mr. Stevenson wants to comment.

Dr. Cameron: I think the unanimity clearly is a more demanding amending formula than the general amending formula. On the other hand, the involvement of Quebec at the constitutional table in the future, which has not been the case in the past, is a potential for reform and change that was not there before. I think some people look back at the aboriginal discussions and say, "Had we had Meech beforehand, it might have been a good deal easier to have approached an accommodation with the aboriginal community."

I think, of course, the rigidity of the unanimity formula, compared to the other one, is evident.

Mr. Chairman: Could you just clarify there again—because this is, I am sure, going to come up on several occasions—the change in the formula of what it now covers and what it does not cover? In other words, what does the 1982 formula continue to cover? I think at times we are going to get confused in different formulae.

Mr. Stevenson: I would point out to Mr. Harris that, in the future, I think that the bulk of proposed amendments will not refer to clauses that require unanimity. They are basically areas that refer to our national institutions, the territories, the distribution of powers, all of those that fall under the general amending formula of seven plus 50.

But section 41 of the Constitution Act, 1982 did provide unanimity for amendments relating to:

"(a) the office of the Queen, the Governor General and the Lieutenant Government of a province;

"(b) the right of a province to a number of members in the House of Commons not less than the number of senators by which the province is entitled to be represented at the time this part comes into force;

"(c) subject to section 43, the use of the English or the French language;

"(d) the composition of the Supreme Court of Canada; and

"(e) an amendment to this part."

What was added by the Meech Lake accord to that unanimity section were: the principle of proportional representation of the provinces in the House of Commons, the powers of the Senate and the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators, the other elements of the Supreme Court of Canada, the extension of existing provinces into the territories and the establishment of new provinces.

Essentially, it is a question of national institutions and the basic structure of the federal-provincial makeup of the country. But if one looks at potential amendments in the future, obviously the Senate will fall under that and the question of potential new provinces. For the rest, they would be likely under the seven-and-50 clause.


Mr. Chairman: Mr. Cordiano.

Mr. Allen: Mr. Chairman, are we shifting to another question? I would like a little supplementary on this one.

Mr. Cordiano: Go ahead.

Mr. Allen: In 1982, for some reason, the list covered by unanimity did not include those latter items.

F-1145-1 follows



~~Mr. Stevenson:~~

~~the question of potential new provinces, but the rest would likely be under the~~
~~seven and 50 clause.~~

~~Mr. Chairman: Mr. Gordiano?~~

~~Mr. Allen: Are we shifting to another question? I would like a~~
~~little supplementary on that one, which is essentially:~~

~~Mr. Gordiano: Go ahead.~~

~~Mr. Allen: Is it a supplementary to this one?~~

~~Mr. Gordiano: Go ahead.~~

~~Mr. Allen: Just a very brief one. In 1982, for some reason, the list~~
~~covered by unanimity did not include those latter items. Now, in 1987-88, the~~
proposal is to include them. Why were they left out in the first place? They
are national institutions and pertain thereto. Why were they included the
second time around, and at whose insistence?

Mr. Stevenson: In the first instance, I think governments were
trying to keep that list as restricted as possible, knowing, of course, that
unanimity does provide real rigidity in getting achievement. I think the
second time around there was an attempt first to deal with the Quebec desire
to ensure that you could not have the basic institutions of the national
government changed without Quebec's approval, so you had the Quebec veto
requirement. Then, as we were saying just a little while ago, you had the
every-province-is-equal argument put up against the Quebec veto, resulting in
unanimity.

There was also, though, I think, an increasing belief that, with the new
processes that are being arrived at, unanimity would not be such a barrier as
it had been seen to be in the past. Previous constitutional exercises had
failed in the past 20 years largely because they involved so many different
pieces. With the potential now for proceeding one by one, you could prepare
the groundwork for unanimous agreement on these things that do affect all
provinces, the national institutions, and that unanimity therefore was not
unreasonable. Many other federations require unanimous agreement before you
can change the basic institutions of the federal state.

Mr. Cordiano: I just want to go back to this notion of the process
that is involved in constitutional reform. Of course, your brief is very
thorough and certainly looks back some distance in our history. But looking
back, as we as a nation have conducted this process of constitutional reform,
we have always had first ministers meeting to determine changes. Perhaps you
can shed some light on that.

Going back to the days of Confederation, the Fathers of Confederation
meeting in Charlottetown, how has that been conducted? Has it been conducted
in any other way? Have we not followed history on that in the last 20 years
with the institution of first ministers' conferences?

Mr. Cameron: I think it has been a longstanding practice in Canada
that the executives in the governments of Canada would work out together
arrangements where they had relationships and involvements that had to be

Mr. Cameron

C-1145-2

39

February 2, 1988

sorted out. If you go far enough back, the necessity of ongoing, intimate, continuing reconciliation of positions and policies in a federal state was simply much, much less. You did not have to have that much contact with the other governments because you did not have that much need to do it.

As well, I think when you go further and further back, the working assumption of people was that the governments took the responsibility to act, one hoped, on behalf of the people, and you let them get on with it. There have been a number of forces at work that have pushed us quite sharply in another direction. One is simply the modernization of society where you have governments increasingly involved in many areas of life, so they have got to work a lot more closely together, and executive federalism has flourished in that environment.

A counterweight, which I think will grow increasingly important, is an increase in democratization. People are more and more interested in involvement in the public sector, involvement in government and controlling government through means that go beyond simply voting the leadership of the country or the province in and out at those times.

~~Mr. Cordiano: Certainly there were some precedents for federal governments to meet with provincial governments, and that involved both jurisdictions. Those were hammered out over a series of meetings in the course of history in this country, and some significant things came out of that. Federal spending in areas of provincial jurisdiction and vice versa where~~

C-1150 follows.

1150

Mr. Cordiano: Certainly there were some precedents for the federal government to meet with provincial governments in areas that involve both jurisdictions. Those were hammered out over a series of meetings in the course of history in this country and some significant things came out of that, federal spending in areas of provincial jurisdiction or vice versa, revenue sharing, etc. That has been the history of federal-provincial relations in this country where the two governments did sit down and discuss changes in the way they were doing things, and that led to constitutional discussions over the years as well. That was my only point.

I also want to get back to this notion of an evolving process of constitutional reform and the involvement of society, a more integral role for people wanting to make changes to society. You could say that of course the charter has had a tremendous impact on that process. Because of the charter, you will now have greater interest on the parts of citizens to make their points of view felt right across the country and to bring about reforms that were virtually impossible to do any other way than by the legislative process in the past. I think that is the sort of thing that we are facing now where the charter is going to have even more impact than the recent impact that it has had.

Mr. Cameron: I think there were at least two streams of thought at the time the charter was seriously being considered and ultimately accepted and implemented. One was clearly that it was a good thing to do from the point of view of the rights and liberties of the citizens of this country, but another dimension, which was part of the politics of the times, was that the charter was, in our vocabulary, a nation-building provision or act, because it meant that Canadians held rights as Canadians nationally and, therefore, the claims with respect to those and the movements for change would be referred to the Supreme Court and the national Parliament, as well as provincial legislatures, but it was a nation-building act in the sense that it really was a common charter for Canadians wherever they were in the country. I think both of those dimensions can be seen in the course of the life of the charter since it was instituted.

Mr. Cordiano: Giving expression to that, and certainly with regard to the charter's role in bringing about an evolutionary process in constitutional reform, but then of course we have the institutionalization of the first ministers' conference on the Constitution, and those two things will certainly allow for changes to be made in the future at those constitutional meetings.

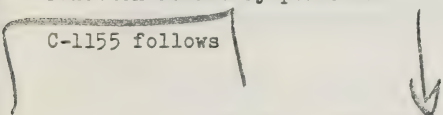
Getting back to the fundamental question of how to charter impacts--you know, we are going to be dealing with this in the days ahead in more detail--in your general opinion, with respect to the charter, this is a question that is going to be raised over and over again, I am sure, and perhaps this is best addressed by legal experts. I do not want to put you on a footing that you probably may not wish to answer, but I am just going to put it forward to you anyway. With respect to the charter, do you think that Meech Lake will have a negative impact on the charter and what it means to constitutional reform in terms of the evolutionary process unfolding? Will it have a dampening effect? That is what I am trying to get at.

Mr. Cameron: I think you are correct that you will be hearing from a range of constitutional experts, ??who may not all perhaps be singing from the same song book, but did you want a personal sense of it?

Mr. Cordiano: That is what I want.

Mr. Cameron: First of all, I think the popular commitment to the charter is very strong and substantial and I think that the behaviour of the courts to date has been to treat the charter seriously and to treat the role of the courts in protecting the provisions of the charter very seriously, so that where there is a choice between a loose-jointed, reserved or modest interpretation and a more energetic, vigorous interpretation, it seems to me the courts can be kind of more in that direction, although you should put that question to people who really know what they are talking about on that score, but I think those are two very important phenomena in assessing this. My sense is that the provisions of the Meech Lake according vis-à-vis the charter, as understood in that sense, will not cripple or undermine its capacity to function as a very powerful--

C-1155 follows



(Dr. Cameron)

...energetic, vigorous interpretation. It seems to me the ??court is tending more in that direction, although you should put that question to people who really know what they are talking about on that score.

But I think those are two very important phenomena in assessing this. My sense is the provisions of the Meech Lake Accord, vis-à-vis the charter as understood in that sense, will not cripple or undermine its capacity to function as a very powerful charter document for Canadians.

Mr. Stevenson: Yes, Mr. Chairman, if I could just perhaps back that one up. There was very much a sense by all governments, when the charter was first put in 1982, that it would take a few years to work out through various judicial decisions, as to the balance between the guarantees in the charter and the potential modifying clauses, section 1, which gives governments a potential for detracting a little bit from the absolute guarantee, or section 33, which is the notwithstanding clause.

There is an agreement that the adequacy of the charter's protections would be addressed as a more global issue after one had had a few years of experience. Those provisions, section 33, were an absolute condition of the charter's acceptance by those governments who had opposed the charter in the first place.

If you go back to the period prior to 1982, the majority of the provincial governments of this country, not including Ontario, were very much against the idea of a charter at all. The only reason they supported it was because they had the potential of the ??nonderogation clause and the clause at the outset, in section 1, that would permit a Legislature potentially to override.

Now those to me are the major issues that will have to be looked at in the future, about the adequacy of the charter's protections. In that light, I would think that the Meech Lake provisions are very much incidental, that there is not that much of a direct potential conflict between Meech Lake and the charter at all.

Mr. Chairman: I am mindful--

Mr. Harris: ??Can I just follow up? Then you can strike me off.

The part of Meech that strikes me as impacting the charter is the selection process for judges. It appears to me--and I am not a lawyer and not an expert on a justice system--as though we are now becoming far more like the US system in that we are going to have judges interpreting--as we just saw with the ??abortion act--not just the law, as they have in the past in Canada, but now interpreting the charter and putting more of their interpretations on it.

There have been some who have suggested that far more looking into the background of judges, as goes on in the States, where they look at, "How does this man think?" through the Senate hearings when they suggest they are going to confirm or reject a presidential appointment.

Mr. Harris

C-15-2

43

February 2, 1988

So when you say there is very little impact of Meech Lake on the charter, I suggest to you there is a dramatic and significant impact and I wonder how much discussion went on as to how judges are now going to be selected as Supreme Court justices in Canada. Was that a significant part of it or was it just: "Quebec wants three. Let's just go ahead and give them three and get on that record."

Was there any discussion of the rest of the process?

Mr. Stevenson: I should say that the three for Quebec has been a practice, it is in the Supreme Court Act, for years.

Mr. Harris: ??I am not so sure--

Mr. Stevenson: That was not the--

Mr. Harris: Yes, I am not as concerned to understand about that--

Mr. Stevenson: Right. No, no.

Mr. Harris: As I am about the whole process.

Mr. Stevenson: I quite understand.

Mr. Harris: And what we are going to see in the future with the charter.

Mr. Stevenson: Yes.

Mr. Harris: And whether that was looked at, in fact, or if not, is it just looked at to, "Let's entrench Quebec so we can move on."

Mr. Stevenson: I think if you go back--some of this is brought up particularly in David's history of that section, that there have been proposals for different ways of appointing Supreme Court justices since this whole exercise of this phase began in the 1960s.

One of the things that really brought it to--

Mr. Harris: But having the charter in place makes quite a difference, does it not?

Mr. Stevenson: Exactly, and the other thing though, was that the Supreme Court is, after all, the constitutional court of Canada, which adjudicates between federal and provincial governments. Canada is almost unique in having the referee, in the sense, appointed by one side of potential arguments. So most constitutional proposals . . .

C-120-1 follows



~~(Mr. Stevenson)~~

~~in the 1960s~~

1200

~~Mr. Harris: But having the charter in place makes quite a difference, does it not?~~

~~Mr. Stevenson: Exactly. The other thing, though, was that the Supreme Court is, after all, the constitutional court of Canada which adjudicates between federal and provincial governments. Canada is almost unique in having the referee, in a sense, appointed by one side of potential arguments. So most constitutional proposals of the past 20 years involved some element of federal and provincial input into the choice of Supreme Court justices.~~

The particular one that was adopted in Meech Lake was one that had been on the table from time to time, although more commonly you had a situation where both governments consulted and then you had some tie-breaking mechanism in case of disagreement. But you will find various opinions, I think, on what the impact of this provision will be. Neither of us is in the legal profession. I think you might well want to ask a number of the subsequent witnesses how they think that will act.

Dr. Cameron: The only point I would make is that the change in the nominating process adds a voice for provincial governments in the naming of Supreme Court judges to that of the federal government. I think it is an interesting question you have raised, but it is not clear to me how that relates to the charter and the interpretation of the charter, which is what I take to be the concern you have raised.

It is clear that it is a confirmation of the role of governments in establishing the supreme court of the land. If it relates to anything with respect to governments, it is the point that Mr. Stevenson made, which is that it is an arbiter of federal-provincial conflict and an arbiter of the Constitution as it relates to powers of governments. So it is logical, if you like, in that sense, that both would have a voice.

But all of that is distinguishable from the question of the charter, which is regulating the relationships between governments and individuals and among individuals. So it has a certain character in that sense. But as to its impact then on the nature of the role of the Supreme Court vis-à-vis the charter, I do not know how it will have an effect. I literally cannot surmise how it would have an effect.

Mr. Chairman: I am mindful of the time, and there are a few more questioners, so I just ask that we be somewhat brief. I have five, in this order: Mr. McLean, Mr. Breaugh, Miss Roberts, Mr. Allen and Mr. Offer.

Mr. McLean: My questions will be very brief. I have two of them. On page 21 of your brief, you indicate the protection for the two official languages and minority language education rights. Can you explain to me how and in what way you are going to protect minority language education rights?

Mr. Stevenson: Page 21 basically refers to the 1982 constitutional

Mr. Stevenson

C-1200-2

45

February 2, 1988

provisions, which are already the law of the land. That in turn relates basically to section 23 of the Constitution as adopted in 1982, which came into effect in April 1982.

This provides that, "Citizens...whose first language learned and still understood is...English or French..., or who have received their primary school education in Canada in English or French...have the right to have their children receive primary and secondary school instruction in that language in that province."

Or, "Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French...have the right to have all their children receive primary and secondary school instruction in the same language."

Finally, "The right of citizens of Canada" in those previous sections "to have their children receive primary and secondary school instruction in the language of the English or French minority...applies wherever...the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and includes," wherever the numbers warrant, "the right to have them receive that instruction in minority language educational facilities provided out of public funds."

So it is that provision which was referred to on page 22 and which has been in effect now for the past seven years.

Mr. McLean: Basically referring to the two official languages?

Mr. Stevenson: Yes.

Mr. McLean: Thank you. The other question I have is on page 35. It says, "In addition, clause 16 confirms that the rights of the aboriginal peoples and the multicultural nature of Canada, as recognized in the constitution acts of 1867 and 1982 are not affected by the distinct society clause."

What you are saying is you are looking at Quebec as a distinct society and leaving out the aboriginal peoples in that distinct society?

Dr. Cameron: It is saying that none of the provisions in that interpretation clause—

C1205 follows



~~Mr. McLean:~~

~~This is clause 15 from ?? of rights of aboriginal people and the multicultural nature of Canada as recognized in the Constitution Acts of ?? 1982, 1867, and 1982, are not affected by the distinct society clause.~~

~~What you are saying is you would like Quebec as a distinct society and leave out the aboriginal people in that distinct society.~~

Mr. Cameron: It is saying that none of the provisions in that interpretation clause respecting the distinct society and respecting English-French duality will affect the provisions in both the 1867 act and the 1982 act with respect to either native peoples and aboriginal rights or the multicultural provision in the 1982 act. So it is specifying that it will not have an effect, that provision will not affect these other provisions of the Constitution.

Mr. McLean: It will not affect the aboriginal people either.

Mr. Cameron: Correct.

Mr. Stevenson: And you will undoubtedly get testimony from other witnesses as to whether that clause was actually needed, or whether it was basically as sense of safeguard against groups who felt that they might be affected.

Mr. McLean: Why were the aboriginal peoples' rights left out?

Mr. Cameron: They are covered by two of the references in clause 16, so it is both aboriginal peoples and multicultural groups. Do I understand your question correctly?

Mr. McLean: Yes, I believe you did. I am not sure ?? I want to know.

Mr. Stevenson: The basic question of aboriginal rights were dealt with both in the 1982 Constitution and in the amendments that came in 1983-84. In the Quebec round, there was no special provision for aboriginal rights, except for that clause, you might say a nonderogation clause or whatever.

Mr. McLean: There are no special rights in the Constitution at all for the aboriginal people.

Mr. Stevenson: Yes. In 1982 and in 1983, there were a series of about four or five amendments relating to aboriginal rights. What was not achieved in the period from 1982 to 1987 was a constitutional right to aboriginal self-government, which we came very close to. If Quebec comes in with the passage of the Meech Lake resolution, I am sure that will be very quickly back on the agenda, because there is a sense that this is unfinished business.

Mr. Chairman: That is certainly an issue that is going to come up before this committee.

Miss Roberts: I will be very brief, if I might. Perhaps Mr. Stevenson you can help me with respect to that. You indicate this is the Quebec round and it is the culmination of the attempt to define Quebec's place in Confederation. Also in your brief, you have indicated that there are still

many concerns in Quebec itself.

Indeed, do you feel from your own sense of feeling of history that we will be relooking at any of the various clauses that were set out here in the Meech Lake Accord? Are we going to be relooking at this some time in the future? Are we going to be sharpening these some time in the future?

Mr. Stevenson: It is difficult to look at the future. I must say personally I feel quite a sense of accomplishment that after having been involved since the early 1960s in trying to get a constitutional accommodation that does involve Quebec, that we have finally done it. But this is a fairly limited list of issues that have been put forward by Quebec over the years. I can quite see in future constitutional conferences others from the historic package coming back. But the current Quebec climate is such that the Constitution is not on the top of the public priority list. I think it would be if this were being rejected. Then I think we would sit very quickly.

This, I think, gives a comfort level--the Meech Lake Accord--for general public pressures and opinions in Quebec for the time being. But there is a nationalist in the hearts of every Quebecker, and depending on the pressures at any time in the future, there may be pressures for other amendments. Obviously there will be pressures for amendments from other groups and other parts of the country over the next few years. Now it would have a process where you can deal singly with them, and annually if necessary.

Miss Roberts: If I might just briefly, Quebec is going to deal with the Charter of Rights in their legislation. Instead of notwithstanding the charter, the charter will be dealt with in their courts--

Mr. Stevenson: Yes. This was one of the policy proclamations of the Liberal government when it came in, that it would no longer--

C-1210 follows



(Mr. Stevenson)

deal singly with them and annually, if necessary.

1210

~~Miss Roberts: Quebec is now, if I might just briefly, going to deal with the Charter of Rights in its legislation, notwithstanding the Charter. The Charter will be dealt with in their courts?~~

Mr. Stevenson: Yes. This was one of the policy proclamations of the liberal government when it came in, that it would no longer do what the previous government had done, take a blanket use of the notwithstanding clause to exempt Quebec legislation from the charter. That is no longer happening.

Mr. Allen: Before I put my question, I wanted to note a couple of items. You did refer again to the use by Quebec of the notwithstanding clause, and I think one would want to at least note in passing that Quebec itself has a very ambitious and comprehensive Bill of Rights and Freedoms which, of course, governs Quebec legislation. That is important to say when one makes a statement like that. Second, I noted, and I do not know whether it was a deliberate omission, that when you reviewed the changing identities and character of the nation, you did not anywhere use the word "multiculturalism." I do not know whether that was a deliberate oversight.

I wanted to ask you was, there was a reference to the Pepin-Robarts proposal with regard to a distinct society, actually pinning down the characteristics of a distinct society in terms of distinctiveness of history, language, law origin, aspirations and politics. Yet all that kind of description of what was meant by distinct society was not included in the Meech Lake statement. That has given rise to a lot of debate as to what in fact was being referred to in terms of distinct society.

Can you tell us what Ontario understood in its participation in this discussion, and in its agreement with that language, what Ontario understood a distinct society to mean.

Mr. Camera: Just with respect to your first point, what was intended on page 3--I am ?stung by this, I hope we have not neglected this. We made two points, one is when we talked about national building, it is the framework of a very diverse society, which comprehends multiculturalism, but on page 3 we were talking about the post war change and talked about large numbers of immigrants who have chosen Canada, making it pluralistic and dynamic, and we were really getting at the phenomenon, or intending to there.

Mr. Breaugh: If the fog level had been 11 instead of 18 ?? might have understood that.

Mr. ??Cameron: This is where we should have been clear instead of obscure.

Mr. Breaugh: One of our official languages.

Mr. Cameron: That is right. I think that very question--Don may want to comment further on the second question, but I think one of the reasons I suspect that people did not get into a definition of what a distinct society meant, is addressed exactly in your question, just how difficult it is to get it right when you are trying substantively to describe the features of

Mr. Cameron

C-1210-2

49

February 2, 1983

something as dynamic and ??supple and is changing, as a society, so that there may be some advantage in leaving that a more open category, recognizing that language is a centrepiece in this office, but there are historical conditions and legal arrangement. The Constitutional arrangements would also be.

Mr. Stevenson: I might refer you to the report of the parliamentary committee on this question because it does go through that question quite well, on why the definition was not expanded. For instance, it mentions that if you had tried to define a distinct society constitutionally 20 years before, you would have had a very different perspective on what made Quebec different from the rest of the provinces. You would probably bring religion in at that point, which you did not, and nobody thought you would a year or so ago. This is obviously something that will work out over time, but it must be remembered that this is just an interpretative clause, so it will be only brought in when there is a potential conflict in substantive clauses. Again, it does provide a measure of symbolic comfort to Quebecers that, for the first time there is that constitutional recognition that Quebec is considered to be distinct within Canada.

Mr. Offer: I do not think I am being overly simplistic, but it seems that there are two major areas, and that is constitutional reform and there we hear comments and concerns as to what it means and the implications of the sections, and second, the constitutional reform process. I would like to deal a little bit with the process, leaving your submission gone through the process as it was.

1215-1 follows



I do not think it is being overly simplistic, but it seems there are two major areas and that is constitutional reform, and there we hear comments and concerns as to what it means and the implications of the sections and, second, the constitutional reform process. I would like to deal a little bit with the process given your submission gone through the process as it was. What has led up to what we are here today for.

My question is that with respect to the process as you see it evolving, not what has gone on in the past, but as you see it evolving, and in particular the constitutionalization of the first ministers' conference, do you see this as an improvement first step in the evolution of the constitutional reform process? I would like to get your feeling on that.

Mr. Cameron: I think the first ministers' conference is an institution that will be with us for many years to come and has performed and will continue to perform a significant role in the working out of federal-provincial relations and national problems of many kinds.

My own view is that to that is to be supplemented or into that has to be integrated much more explicitly the opportunities and capacity for society more generally, not organized and represented by first ministers or by ministers, but organized and represented in a variety of forms to have a voice and to express priorities and to have an impact on the ongoing process.

No doubt that is excessively general, but it is where I am going to stop because I do not have an answer on the question of precisely what mechanisms would be appropriate. I would suspect that the government, as well as this committee, will be giving thought to those sorts of issues as we move through this stage and on into the next one.

Mr. Chairman: I think that is a good point to end our discussions with that sense of something that is to come and undoubtedly something that the committee will be addressing.

If I may, on behalf of the committee, Mr. Cameron and Mr. Stevenson, thank you both not only for your paper, which has certainly given us a great deal to reflect upon but also your answers to our questions. I think that has given us a good starting off, so many thanks.

This committee stands adjourned until two o'clock.

The committee recessed at 12:16 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

TUESDAY, FEBRUARY 2, 1988

Afternoon Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)
VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)
Allen, Richard (Hamilton West NDP)
Breaugh, Michael J. (Oshawa NDP)
Cordiano, Joseph (Lawrence L)
Elliot, R. Walter (Halton North L)
Eves, Ernie L. (Parry Sound PC)
Fawcett, Joan M. (Northumberland L)
Harris, Michael D. (Nipissing PC)
Morin, Gilles E. (Carleton East L)
Offer, Steven (Mississauga North L)

Substitution:

McLean, Allan K. (Simcoe East PC) for Mr. Eves

Also taking part:

Polsinelli, Claudio (Yorkview L)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service
Madisso, Merike, Research Officer, Legislative Research Service

Witness:

Individual Presentation:

Hogg, Dr. Peter, Professor, Osgoode Hall Law School

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON CONSTITUTIONAL REFORM

Tuesday, February 2, 1988

The committee met at 2:06 a.m. in committee room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: Ladies and gentlemen, I see a quorum and I think we can begin this afternoon's session. I want to welcome Professor Peter Hogg of York University's Osgoode Hall Law School. It is a pleasure to have you with us this afternoon. We have briefly discussed, prior to the meeting, how we might proceed. I think if you could just set that out and begin, we will start the afternoon session.

Dr. Hogg: Mr. Chairman, as you know, I have published a little annotation of the Meech Lake constitutional accord. In effect, I am going to use that as my notes for today's presentation.

Mr. Chairman: I should mention that we have provided each of the members with a copy of appendices 2 and 3 so that you may make reference to that and we can follow along.

Dr. Hogg: There are two other bibliographic sources of which the committee is probably aware, but let me mention them just in case you are not. First, there was a conference at the University of Toronto in October 1987, solely on Meech Lake, the proceedings of that conference being published under the editorship of ??Carol Rogerson and ??Kathy Swinton, two professors at the University of Toronto. I think you will find that is a useful source of material on Meech Lake.

Second, which of course you know about, but let me mention it because it is particularly useful, is the report of the federal committee; a special ??joint committee on the Constitution of Canada. You will find that report to be a very useful source. Those are really the only published sources that I know about, Mr. Chairman.

Mr. Chairman: Thank you.

Dr. Hogg: Mr. Chairman, if it is agreeable to you, what I would like to do is speak very briefly about the history. I understand you have talked about the history this morning, so I only want to spend about five minutes on that. Then I would like to go through Quebec's five demands...

C-1410 follows.



~~(Dr. Hogg)~~~~You will find to be a very useful source. Those are really the only published sources that I know about, Mr. Chairman.~~

1410

~~Mr. Chairman: Thank you.~~

Dr. Hogg: ~~What I would like to do, Mr. Chairman, if it is agreeable to you is to speak very briefly about the history. I understand you talked about the history this morning and so I only want to spend about five minutes on that. Then I would like to go through Quebec's five demands and take you through the text that reflects the agreement on each of those five points. That leaves the senate and the First Ministers' conferences as topics which were not included in Quebec's five demands and which I would then look at, at the end. That is how I plan to proceed if that is acceptable.~~

Mr. Chairman: Please go ahead.

Dr. Hogg: The reason why I want to repeat the very recent history is because I do think it is absolutely critical to the understanding of the accord. The roots of the accord if one goes back just a very short distance, are to be found in Quebec's referendum on sovereignty association which was held in 1980. As everybody recalls, that referendum was defeated by a popular vote of 60 per cent to 40 per cent. But, in the referendum campaign, it seems to me to be clear that the federalist forces promised that a no to sovereignty association was not a vote for the status quo and that the defeat of the referendum would be followed by constitutional change. Constitutional change designed to better accommodate Quebec's aspirations.

Now following the referendum a process of constitutional discussions immediately took place and of course there is no need for me to take you through that, except to notice that when the agreement was reached on November 5, 1981, the agreement that subsequently became the Constitution Act, 1982. It did not satisfy that particular objective. It did many good things. It gave us a Charter of Rights, it patriated the Constitution. It gave us an amending formula and it did some other things, all of which nearly everyone applauds. But, what it did not do, was to make the Constitution more acceptable to Quebec. That objective was not achieved.

It was not achieved both in a technical sense because you will recall that the Premier of Quebec was the sole dissenter from the agreement of November 5, 1981. But, on top of that, the settlement did diminish the powers of the government and Legislature of Quebec. It diminished them because the amending formula did not include a veto for Quebec, something which in practice had always been accepted in the past and the Charter of Rights restricted the powers of the Legislature of Quebec. It restricted the powers of the Legislature of Quebec in a number of ways. In particular, by rendering unconstitutional the so-called Quebec clause of Quebec's school law, which restricted admission to English language schools. That was a particular bone of contention and of course the Supreme Court of Canada a couple of years later confirmed that the charter had indeed struck down the Quebec clause of Quebec's English school language law.

So the bad side of the Constitution at 1982, was that it had caused some diminution in Quebec's powers without Quebec's consent, and of course it had created a profound sense of grievance in Quebec.

Dr. Hogg

C-1410-2

3

February 2, 1988

It is to cure that fault in the Constitution Act, 1982 that is the chief purpose of the Meech Lake accord. The Meech Lake accord stems from five demands that were made by the province of Quebec when after Quebec's government had changed to the present Liberal government of Premier Bourassa and the government of Canada had changed---

C-1415-1 follows



~~that is the chief purpose of the Meech Lake accord. The Meech Lake accord stems from five demands that were made by the province of Quebec after Quebec's government had changed to the present Liberal government of Premier Bourassa and the government of Canada had changed to the present Progressive Conservative government of Prime Minister Mulroney.~~

Quebec made five requests. They were as follows, this is how I plan to go through the accord under these five headings: The first was recognition of Quebec as a distinct society. The second was a greater provincial role in immigration. The third was a provincial role in appointments to the Supreme Court of Canada. The fourth was a limitation on the federal spending power, and the fifth was a veto for Quebec on constitutional amendments.

I am a relative newcomer to Canada. I came in 1970, so I do not have the experience that nearly everybody else in this room has, but I do believe that it was an important historical moment, if you like, when the Meech Lake accord finally did reach agreement on those five matters. I do not believe that ever before it has been possible to give an answer to the question "What does Quebec want?" At Meech Lake, Quebec said, "This is what we want." I think that was an extraordinarily important development.

The Meech Lake accord has had some practical effects as well because Quebec's exclusion from the 1982 agreement, although Quebec was legally bound by the Constitution in 1982, its exclusion did cause Quebec to take a number of steps, which in effect were protests against the Constitution. One of those steps was that Quebec refused to participate in constitutional discussions, which essentially involved operating the new amending procedures, to which it had not agreed.

Now the consequence of Quebec not participating in future constitutional discussions means it is really impossible to have any serious constitutional change without Quebec at the table. I think that is an important problem, a problem that has been resolved by the agreement at Meech Lake.

Another thing that Quebec was doing as a protest to the 1982 act was that it was opting out of the Charter of Rights to the greatest extent possible. As the committee knows, the Charter of Rights contains an override, opting out or notwithstanding clause, Quebec put that clause into every single one of its existing statutes and the constitutional validity of that is not clear because it is being litigated now in the Supreme Court of Canada, but essentially Quebec tried to remove all of its existing statutes from the scope of the charter and started to put the clause in as a matter of routine in every new statute it enacted.

Now the Liberal government under Premier Bourassa, once the negotiations for the Meech Lake accord got under way, stopped the practice of automatically putting the notwithstanding clause in the statutes, but obviously if the Meech Lake accord were to fail, presumably Quebec would want to resume the protests that it was formally engaging in. It was not just the Parti Québécois government. It was the Liberal government as well.

There were some fairly important consequences of Quebec being alienated from the Constitution, notwithstanding the fact that Quebec was literally bound by the terms of the Constitution.

Dr. Hogg

C-1415-2

5

February 2, 1988

Let me turn now to the five points and how they have been implemented in the accord. The first point was the recognition of Quebec as a distinct society. That is reflected in clause--

C-1420 follows



~~that is reflected in section 1~~ of the accord and it is adding a new section 2 to the Constitution Act, 1867. I will not read the whole of the section, but I will just read the first subsection 1 because that is really the leading part of it. The new section will read:

1420

??"1. The Constitution of Canada shall be interpreted in a manner consistent with,

"(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and"--here is the clause that Quebec sought--

"(b) the recognition that Quebec constitutes within Canada a distinct society."

This clause has given rise to a lot of a difficulty. It is perfectly true that the phrase "distinct society" is not defined and so it is hard to know exactly what it means. The critics of Meech Lake tend to emphasize, and emphasize rightly, that there is a good deal of vagueness in that clause.

For my part, I am not so troubled with the vagueness of it. Let me explain why I do not think the vagueness of it is such a serious problem.

First of all, the provision is only an interpretative provision. It is simply a rule of interpretation. It does not confer any new power, nor does it deny any power. It is chief relevance is really only for when other constitutional provisions are vague or ambiguous and where reference to the idea of a distinct society would help to resolve the ambiguity.

I have tried to think of the kinds of issues where the distinct society clause might be helpful in resolving an ambiguity. It is very difficult to find legal issues to which the distinct society clause would provide a helpful role in interpretation. Although I do not think the distinct society clause is totally ineffective, primarily I think it is an affirmation of a sociological fact and that it does not have a great deal of direct legal significance. That is my first point.

A second point is that whatever the distinct society means in section 2, it does not mean a society that is exclusively French speaking. We can say that categorically because in ??subsection 2(1) itself, the recognition that Quebec constitutes within Canada a distinct society is preceded by the so-called duality clause, and the duality clause recognizes, among other things, that there are English-speaking Canadians present in Quebec. I take it to be a compelling influence that the distinct society of Quebec is a society in which there is an English-speaking minority living along with the French-speaking majority.

The suggestion, for example, that has occasionally been made that--

C-1425 follows

~~...that there are English-speaking Canadians present in Quebec. I take it to be a compelling inference that the distinct society of Quebec is a society in which there is an English-speaking minority living along with the French-speaking majority. For example, I think the suggestion that has occasionally been made that in some fashion the Meech Lake accord delivers over the English-speaking minority to the hands of a French-speaking majority is clearly incorrect.~~

Let me turn now to the effect of the distinct society clause on the Charter of Rights and Freedoms. The first point to make is that the distinct society clause does not override the Charter of Rights--on the contrary. Because the distinct society clause is simply a rule of interpretation, it is subordinate to the Charter of Rights, so that a law that was passed by Quebec to promote its distinct identity would, like any other law, have to comply with the Charter of Rights. If the law was contrary to the Charter of Rights, it would be invalid.

There is one indirect way in which the distinct society clause may impinge on the Charter of Rights. As members of the committee know, a law that is inconsistent with a charter of rights can be saved by section 1 of the charter. Section 1 of the charter is the section that says that the rights and freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A law that is held to violate a charter of rights will be upheld if it is a reasonable limit on the charter of rights and if it can be demonstrably justified in a free and democratic society.

Of course, a very recent example of the use of section 1 was the ??Edwards Books and Art case upholding Ontario's Sunday closing law. Ontario's Sunday closing law was held to be contrary to freedom of religion, but the Sunday closing law was held to be a reasonable limit designed to produce a secular day of rest.

In deciding the question of whether a law is a reasonable limit on a charter of rights, one of the things that the Supreme Court of Canada has said you look at is the purpose of the law. If a law had as its purpose the promotion of Quebec's distinct society, then that would undoubtedly serve as a purpose which could help to persuade a court that the law was a reasonable limit demonstrably justified in a free and democratic society.

Quebec can do that now. Quebec can, without Meech Lake, offer its facts about Quebec's distinct society in justification of a law that arguably infringes a charter of rights. What the new section 2, the new distinct society clause, will do is give that line of argument some added weight. In that indirect fashion, the distinct society clause could somewhat expand the power of the Legislature of Quebec to derogate from the charter.

Of course one of the things that the committee will want to consider is how serious...

C-1430 follows.

(Mr. Hogg)

~~and so in that indirect fashion, the distinct society clause could somewhat expand the power of the Legislature of Quebec to derogate from the charter~~

1430

~~One of the things that the committee will want to consider is of course~~
how serious that problem is, the fact that the distinct society clause may indirectly assist the Quebec Legislature to derogate from the charter. One point that should be remembered in assessing that question is that no legislative purpose, no matter how legitimate, is automatically regarded by the court as justification for a law under section 1 of the charter.

The Supreme Court of Canada in the Oakes case--that is, O-a-k-e-s--has emphasized that a proportionality test has to be satisfied as well and, among other things, the proportionality test requires the court to be satisfied that the law impairs the guaranteed right as little as possible or, in other words, uses the least drastic means to accomplish its objective. The proportionality test also requires the court to balance the injury to the guaranteed civil liberty against the legislative purpose.

So the court does exercise a balancing role in deciding whether a law that is designed to meet an admirable purpose can justifiably infringe on a charter right. The court would undoubtedly do that, even if the purpose of the law was to promote Quebec's distinct society.

The second point about the Charter of Rights is this. As you know, section 33 of the Charter of Rights permits any legislature to override the Charter of Rights. That is what Quebec has been routinely doing as a protest against the Meech Lake Accord.

Mr. Chairman: ??Constitution Act? You said the Meech Lake Accord.

Mr. Hogg: Oh. I am sorry. Yes. That is what Quebec was doing routinely after the Constitution Act, 1982.

The point I am making now is that the Quebec Legislature can escape from most of the provisions of the charter right now through the use of section 33. So even without the distinct society clause, if Quebec wants to derogate from, for example, freedom of expression, which is one of the guarantees which, for example, has been offered as an objection to Quebec's commercial signs law, it can do that through the use of section 33. It can do that without Meech Lake, with any recourse to a distinct society, or anything else, just simply by using the power under section 33 to add a notwithstanding clause to the legislation.

The final point--and then I will leave the Charter of Rights, although I am very happy to come back to it at the end of my presentation if people want to talk some more about it--is that women's rights have a special protection in the Charter of Rights. It is contained in section 28 of the Charter of Rights, which is essentially Canada's version of the equal rights amendment that failed in the United States.

Section 28 provides that "notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

↓
[1435 follows]

(Dr. Hogg)

...28 of the Charter of Rights, which is essentially Canada's version of the equal rights amendment that failed in the United States. Section 28 provides that notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons. Section 28 cannot be overridden by a "notwithstanding clause" under section 33 because it opens with the phrase, "Notwithstanding anything in this charter," and it is arguable, although it is not absolutely certain, that sexual equality cannot be derogated from even under section 1 because of the phrase "notwithstanding anything in this charter" at the beginning of section 28. So while it is not possible to be absolutely categorical about what section 28 means or what degree of protection it provides, it may be that section 28 would, in effect, even overcome the "distinct society" clause if the "distinct society" clause were used as a ground for justifying a law that discriminated against women under section 1.

Mr. Chairman, I would like to leave the "distinct society" clause at this point and turn to the next of Quebec's demands, which was a greater provincial role in immigration. That aspect of the accord was given effect by clause 3 of the schedule adding new sections 95(a) to 95(e) to the Constitution Act, 1867.

The purpose of the new 95(a) to 95(e) is to provide a mechanism for the establishment of defined roles for the two levels of government in the field of immigration. The present constitutional position is contained in section 95 of the Constitution Act, 1867. What section 95 does is grant to the federal Parliament and the provincial Legislatures concurrent powers over immigration. It is one of the few provisions in the Constitution Act, 1867, that grants powers to both levels of government.

Section 95 accords paramountcy to the federal law where there is a clash between the federal and the provincial law. What section 95 does not do is to explain how these shared powers ought to be shared. Now this is a particular concern to Quebec because Quebec has always been more concerned than the other provinces about the size and composition of its immigrant groups and particularly about their ability to settle in a predominantly French-speaking environment. So since 1971, immigration to the province of Quebec--it is immigration to Canada, but immigration by those immigrants

C1440 follows

(Dr. Hogg)

~~about the size and composition of its immigrant groups and particularly about their ability to fit in a predominantly French-speaking environment~~

1440

~~So, since 1971, immigration to Quebec, its immigration to Canada, and immigration by those immigrants that indicate an intention to settle in Quebec, that has been governed by a series of agreements between the federal and Quebec governments. The current agreement is the so-called Cullen-Couture agreement of 1979. The main purpose of those agreements is to enable Quebec to participate in the selection of those persons who are going to settle permanently or temporarily in Quebec.~~

Now, six other provinces have also entered into agreements. But, Ontario, which of course is the main recipient of immigrants, has never entered into an agreement with the federal government, nor has British Columbia or Manitoba.

What the new 85a. to 95e. do, is that they make provision for giving constitutional status to immigration agreements like the Cullen-Couture agreement.

From Quebec's point of view, an objection to the system of agreement prior to Meech Lake, was that they did not have constitutional status and therefore they could be abrogated by a federal statute. So Quebec took the view apparently, that a mere agreement was not a secure enough basis for the sharing of powers over immigration. And so what the new provisions will do will be to confer constitutional protection on an immigration agreement so as to shield it from the unilateral power of the federal Parliament.

Now, that shield is not complete because 95b.(2) preserves a degree of federal legislative power. 95b.(2) provides an agreement that has the force of law under subsection 1--that is the immigration agreement--shall have effect only so long and so far as it is not repugnant to any provision of the Act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants, or relates to levels of immigration for Canada, or that prescribes classes of individuals who are inadmissible to Canada.

So by entering into an immigration agreement, the federal Parliament does not lose its authority to set national standards and objectives relating to immigration or aliens. So for example, a change in federal policies regarding immigration would not necessarily require the renegotiation of every immigration agreement, but could be implemented by a law that set new national standards and objectives.

Let me turn now to the third element in the Quebec list, which was a provincial role in appointments to the Supreme Court of Canada. Those provisions are to be found in clauses 4 and 5 in the schedule to the accord and they are the new sections 101a. to 101e. that are going to be added to the Constitution Act, 1867.

C-1445-1 follows

(Dr. Hogg)

~~...These provisions are to be found in clauses 4 and 5 of the schedule to the
second and they have new sections, 101A to 101E, that are going to be added to
the Constitution Act, 1987.~~

These provisions do a good deal more than simply provide a provincial role to appointments to the Supreme Court of Canada. What they essentially do is set out the basic elements of the Supreme Court of Canada in text that will become part of the Constitution.

So the provisions provide for the existence of the court, for the fact that there are to be nine judges. It makes provision for the appointment of the judges. It provides that three of the judges must come from Quebec. There are guarantees of independence buried in section 101D and 101E makes clear that changes to the court can be enacted by the Parliament of Canada provided they do not touch the matters that are now contained in the constitutional text.

Now, one result of this part of the Meech Lake Accord is to place the Supreme Court of Canada in the Constitution. Up until now, the Supreme Court of Canada was a purely statutory court and theoretically at least, it could actually be repealed by the unilateral action of the federal Parliament. It had always been a bone of contention in federal-provincial discussions that the court which serves as the arbiter of federal-provincial constitutional disputes ought not to exist by the sufferance of one level of government, that ought to be protected by the Constitution. So that is one thing that the Meech Lake Accord does that most people regard as a very important step.

But of course the really controversial part of the Meech Lake Accord is the new provisions for the appointment of judges. You can see those provisions if you start at subsection 101A(2). The leading provision says, "The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letter patent under the Great Seal." So the appointing power remains with the Governor General in Council or the federal cabinet.

But subsection 101C(1) goes on to say, "Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B for appointment to that court."

Subsection 101C(2) goes on to say, "Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada."

The way the system works is that the federal government is obliged to appoint to the Supreme Court of Canada a person whose name has been submitted by the province from which the vacancy comes. For example, when one of the three judges from Quebec dies or retires,

C-1450-1 follows

~~The way the system works is that the federal government is obliged to appoint to the Supreme Court of Canada a person whose name has been submitted by the province from which the vacancy comes. So for example, when one of the three judges from Quebec dies or retires, the vacancy would have to be filled from Quebec by a person who is acceptable both to the government of Quebec and to the government of Canada.~~

1450

Similarly there are by convention three judges from Ontario and if one of the three Ontario judges died or retired, fidelity to past practice would require that the vacancy be filled from Ontario by a person who is acceptable to both the government of Ontario and the government of Canada.

The new 101c. contains no provision for breaking a deadlock and that has been a point of criticism of the accord. What is to happen if the federal government finds none of the names submitted by a province to be acceptable? That is the problem.

It seems to me that is not a realistic concern where the vacancy to be filled is outside of Quebec because if the federal government finds the list of names submitted by one province to be unacceptable, it can consider the list from another province. That is even true when the vacancy comes from Ontario, because although Ontario has a formal quota of three judges on the court, that quota is not a hard and fast rule. In fact it has been departed from in just the last few years, when for example, Mr. Justice ??McIntyre from British Columbia was appointed to replace Mr. Justice Spence from Ontario. That reduced Ontario's quota to two. Ontario's quota was then later restored to three when Madam Justice Wilson from Ontario was appointed to replace Mr. Justice ??Maitland from Alberta.

When any one of the six non Quebec judges dies or retires, the federal government effectively has a choice of provincial lists and can shop around among the provincial lists for the very best candidate. When the vacancy is from Quebec however, there is no escape from the requirement that the governments of Quebec and Canada do have to reach an agreement on a candidate. In the event that no agreement could be reached, then no appointment could be made and the court would have to function with only eight members. Presumably that situation would continue with a court of only eight members including only two Quebecers until the political situation changed so as to enable the deadlock to be broken.

One of the issues that the committee will have to decide is whether it is acceptable to have provisions of this kind without a deadlock breaking mechanism. It is not very easy to design a deadlock breaking mechanism and my feeling is that probably this is the kind of issue upon which governments would come to an understanding and that a deadlock is unlikely to occur. But, obviously that is a matter of judgement upon which I have no special expertise.

Another criticism that has been made of the new sections on the Supreme Court is that they effectively exclude from appointment lawyers from the territories. They do that because names have to be submitted by the government of a province. The names have to be the names of persons admitted to the bar of the province.

C-1455-1 follows

~~lawyers from the Territories. They do that because names have to be submitted by the government of a province, and the names have to be the names of persons who have been admitted to the bar of the province.~~

If you look at ??section 101C that provides for the submission of names, it does not make room for a lawyer from the Territories to be placed on a list, even though a person from the Territories is technically qualified under ??section 101B. So it is a funny omission in the proceedings that a lawyer from the Territories is qualified under ??section 101B, but has no way to get on a provincial list because of the way ??section 101C is drafted.

That seems to me to be an unfortunate omission and one that it would be desirable to correct if there is a way of doing so.

There has been another criticism of appointments to the Supreme Court of Canada to which the Meech Lake Accord does not respond. The Meech Lake accord does respond to the criticism that the provinces have not hitherto played a role in the appointment of judges. That is now dealt with by the Meech Lake accord.

The Meech Lake accord does not meet the criticism that the appointing process ought to be more open and ought to be better informed by the views of the people outside government.

Two committees of the Canadian Bar Association have considered this problem, and one committee of the Canadian Association of Law Teachers has considered the problem. All three committees have recommended that the names of candidates for appointment to the bench should be generated by a well-informed advisory committee, a committee which could include representatives of government, that could include representatives of the bench, representatives of the bar, but which should also include nonlawyers.

It seems to me that a committee of that kind ought to be established in Ontario to suggest to the government of Ontario the names that the government of Ontario is now obliged to submit to the federal government for appointment to the Supreme Court of Canada. Clearly a committee of that kind need not be provided for in the Constitution. Perhaps a committee of that kind need not even be provided for by statute. It could be purely informal. But I do think that the Meech Lake accord only takes one step in the direction of opening up the appointing process and that it would be highly desirable for the government of Ontario to take a further step in the opening up of the process.

Whether the government of Ontario establishes committees of the kind recommended, I do not think there is any reason to suppose that the quality of appointments to the Supreme Court of Canada will be diminished by the Meech Lake procedures. I cannot see why the fact that a person has to be acceptable to two governments would produce weaker candidates than simply having to be acceptable to one government. As I said earlier, it seems to me that for some appointments at least, there may be a healthy competition among provinces to try and bring forward the strongest candidate so that the federal government is encouraged to appoint the candidate from one's own province as opposed to the candidate from some other province. I think that the high quality of appointments to the court will be continued under the new accord.

~~...some appointments at least, there may be a healthy competition among provinces to try and bring forward the strongest candidate so that the federal government is encouraged to appoint the candidate from one's own province as opposed to the candidate from some other province. I think that the high quality of appointment to the court will be continued under the new accord.~~

1500

The fourth point--I am sorry this is taking a little longer than I thought--is the limitation of the federal spending power. That part of the accord is contained in a new subsection 106A(1) to be added to the Constitution Act, 1867, "The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives."

Of course, the purpose of this provision is to limit the spending power of the federal government. If the spending power is used to establish a national shared-cost program in an area of exclusive provincial jurisdiction, then section 106A in effect requires that the program must include an opting-out alternative for a province that chooses not to participate in the national program.

Any province that does choose to opt out of the national program must receive "reasonable compensation" from the government of Canada, provided that the province carries on a program or initiative that is "compatible with the national objectives." That is a change in the present constitutional position, which, of course, is that the federal Parliament does not need to compensate provinces that choose not to participate in a national shared-cost program.

My first comment on section 106A is that it constitutes something of a clarification of federal power. Section 106A assumes a number of things that have ?? to been regarded as controversial. Section 106A assumes that the federal Parliament possesses the power to establish and fund a shared-cost program in an area of exclusive provincial jurisdiction. It also assumes that the federal Parliament can attach conditions to its grants to the provinces because cost sharing contemplates grants that are conditional. Finally, section 106A assumes that there can be "national objectives" in an area of exclusive provincial jurisdiction.

It is my view that all of those propositions are correct as a matter of constitutional law, but they are controversial. For example, they are challenged by litigation at the moment brought by both the Ontario Medical Association and The Canadian Medical Association to challenge both the federal Canada Health Act and the provincial extra-billing legislation. I think section 106A does contribute to federal power by clarifying the broad scope of the federal spending power even in areas of exclusive provincial jurisdiction.

C-1505 follows.

(Dr. Hogg)

~~... does. I think contribute to federal power by clarifying the broad scope of the federal spending power even in areas of exclusive provincial jurisdiction.~~
Of course, what ??106(a) also does is limit the federal power through the obligation to provide reasonable compensation to a province that carries on a program for initiative that is compatible with the national objectives.


I think it is unfortunate that the phrase "national objectives" was not given a clearer definition in the constitutional text. However, in the context of ??106(a), it is clear that national objectives must mean the objectives of the national shared cost program. So, for example, if the federal government were to establish a national shared cost program for day care, a province could not use the money for public roads on the grounds that public roads were also national objectives. What I think the section contemplates is that the province must adhere to the objectives set by Parliament for the national shared cost program, and all that is permitted is some variation in the means by which those objectives are to be accomplished.

Let me turn now to the fifth and last of Quebec's points, which was a veto on constitutional amendments. That is accomplished by the amendments to section 40 to 42 of the Constitution Act, 1982, which are contained in clauses 9 to 12 of the schedule to the accord. These provisions are lengthy but they boil down to two fairly simple points:

The first point is contained in section 40, and it concerns the right of a province to receive compensation for opting out of a constitutional amendment. As the members of the committee will recall, the current amending procedures, that is, the amending procedures adopted in 1982, permit a province to opt out of certain kinds of amendments, amendments that derogate from the powers of the province.

One of the disincentives to opting out is that it could carry a financial penalty. Suppose, for example, that provincial authority over prisons was transferred to the federal Parliament. If Quebec opted out of an amendment of that kind, it would have to bear the financial responsibility of operating the prisons in Quebec while in the other provinces, the federal government would pick up the bill for the prisons. So that operates as a disincentive for opting out--the fact that it may carry a cost to the taxpayers of--

C1510 follows



(Dr. Hogg)

~~the federal Parliament. If Quebec opted out of an amendment of that kind, it would have to bear the financial responsibility of operating the prisons in the province of Quebec, while in the other provinces, the federal government would pick up the bill for the prisoners. That operates as a disincentive to opting out. The fact that it may carry a cost to the taxpayers of the province.~~

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Under the existing amending procedures, that problem was only partially met by section 40. Section 40 of the existing provisions, provides that where an amendment transfers provincial legislative powers relating to educational or other cultural matters from provincial Legislatures to parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply. Any province opting out of an amendment relating to education or other cultural matters, was entitled to compensation, but not from other amendments. So for example, in my prisons example, Quebec would not be entitled to compensation if it opted out of a change of that kind.

The new section 40, added by Meech Lake, will extend the right to compensation to all changes that transfer legislative powers from provincial Legislatures to Parliament. Not just changes relating to education and other cultural matters.

That is the first of the two important changes that are wrought by Meech Lake in the amending procedures.

The second change concerns the procedure for certain amendments affecting the senate, the House of Commons, the Supreme Court of Canada and the establishment of new provinces. Those matters at the moment are covered by section 42 of the amending procedures which means that they can be accomplished by the seven province formula or the 7-50 formula. That is the general amending formula that requires seven provinces representing at least 50 per cent of the population.

What Meech Lake does is it takes those matters that are now in section 42, and that are therefore subject to the so-called seven province formula and it moves them into section 41, which requires unanimity. All the matters formally listed in section 42, which as I say deal with the House of Commons, the Supreme Court of Canada and the extension of provinces or the establishment of new provinces, those matters all now become subject to unanimity.

As far as those matters are concerned, Quebec has a veto because the unanimity requirement of course gives every province a veto. With respect to other changes, Quebec does not get a veto, but the full compensation for opting out was evidently regarded by the government of Quebec as being a satisfactory alternative to a veto.

A criticism that has been made of these amending procedures, which is clearly correct, is that it will make the Constitution more difficult to amend. It means for example that senate reform will require unanimity now, whereas before Meech Lake, the seven province formula would have done it. It means as well that the establishment of new provinces requires the unanimous agreement of all existing provinces, whereas before Meech Lake, the seven province formula would have sufficed.

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(Dr. Hogg)

~~whereas before Meech Lake, the "seven province" formula would have done it. It means as well that the establishment of new provinces requires the unanimous agreement of all existing provinces, whereas before Meech Lake, the "seven province" formula would have sufficed. So the amendments do have the unfortunate result of making the Constitution more rigid.~~

That covers all of Quebec's five matters. However, the accord goes on to deal with two other points. If I may briefly refer to those, I will then be finished. The first of these is the Senate.

The important provision regarding the Senate is the new section 25 of the Constitution Act, 1867, which is contained in ??section 2 of the schedule to the accord. What section 25 provides is that when a vacancy occurs in the Senate, the government of the province to which the vacancy relates must submit names to the federal government and then the federal government must fill the vacancy from the names submitted by the province. So it is a procedure somewhat similar to the procedure for appointments to the Supreme Court of Canada.

This provision was not one of Quebec's five conditions for adherence to the Constitution Act, 1982, and the only reason it is in there, as I understand it, is that some of the western governments were reluctant to enter into a constitutional agreement that made no reference to Senate reform. So the solution was to put into the Constitution the provision for provincial nomination to the Senate and although it is not expressed as an interim measure, it is intended to be an interim measure until a more far-reaching reform of the Senate is agreed to.

The ultimate goal, as I understand it, of at least British Columbia and Alberta is a triple-E Senate, which will be elected, equal and effective. One thing that troubles me about section 25 is that if it does not prove to be possible to reach agreement on a triple-E Senate in future constitutional discussions, then section 25 will become the permanent way of filling vacancies in the Senate, and it seems to me to be unfortunate to have members of a federal legislative body who are appointed by a province and who are not accountable or recallable until their death or retirement.

My final point is that the Meech Lake accord made provision for future first ministers conferences. There are two provisions that deal with that, one which is not particularly important is in section 8 of the accord, and it adds a new section 148 requiring a meeting of the first ministers every year to discuss the state of the Canadian economy.

The second provision is much more important and it is a new section 50 of the Constitution Act, 1982. It is contained in ~~section 25~~

C1520 follows

~~ministers every year to discuss the state of the Canadian economy~~

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~~The second provision is much more important, and it is a new section 50 of the Constitution Act, 1982. It is contained in section 13 of the schedule to the accord. This requires that there be a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces every year, commencing in 1988.~~

Subsection 50(2) provides that "the conferences convened under subsection 50(1) shall have included on their agenda the following matters:

(a) "Senate reform, including the role and functions of the Senate, its powers, the method of selecting senators and representation in the Senate;

(b) "roles and responsibilities in relation to fisheries; and

(c) "such other matters as are agreed upon."

The impulse of this undoubtedly was the concern of those premiers that, after the Meech Lake accord, the first ministers would not continue the process of constitutional change and move onto the Senate, fisheries and other matters. This provision provides some guarantee that those items will appear on future constitutional agendas.

I think the provision is unfortunately drafted because it appears to mandate a constitutional conference every year into the indefinite future, which seems to call for an undue preoccupation with constitutional reform. It also requires that every one of the conferences have on its agenda every year Senate reform, fisheries and such other matters as are to be agreed upon. Again, you get tired of the Senate and fisheries as it remains on the agenda year after year.

I assume that what is really intended is that, as agreements are reached on those matters, section 50 itself would be amended to strike out the agenda items about which it is no longer sensible to keep talking. It is an odd use of a Constitution to put in it provisions that you are planning to knock out again in a few years' time. It is treating the Constitution a bit like an income tax act.

Mr. Breaugh: The guys are going to talk politics and fishing.


Dr. Hogg: Mr. Chairman, that concludes my presentation. I will be happy to respond to any questions that you or any of the other members of the committee wish to put to me.

Mr. Chairman: Thank you very much. I think in the best sense we have all gone back to university and followed through a most thorough review of the act, and that was extremely helpful. Because of your last remarks, I am not sure whether at some point we are going to feel like we need to launch a class action against parts of this accord, but we may indeed, if there are constitutional meetings every single year, get rather fed up with it all after a while.

Mr. Offer: You opened your discussion with respect to the distinct society clause. I think you spoke about it in terms of it being an affirmation of a sociological fact. I am sure that you are aware that there have been concerns expressed by other groups--and I am going to use an example of women's groups--that this distinct society clause may negatively impact upon their rights. I am wondering if you might share with us your thoughts as to the impact of the distinct society clause on women's rights.

Dr. Hogg: I think the main problem with the distinct society clause is that it...

C-1525 follows.



~~other groups and I am going to use as an example, for instance, women's groups, that this particular section, this distinct society clause, may negatively impact upon their rights. I was wondering if you might share with me your thoughts as to the impact of the distinct society clause on women's rights.~~

Dr. Hogg: I think the main problem with the distinct society clause is that it is not particularly clear and therefore it is difficult to be categorical about exactly what its implications are. Therefore, groups such as women's groups are understandably concerned, that the very vague language may have unexpected or unintended repercussions on their rights. So I think they have a very legitimate concern.

I do think, as I said earlier on, that the distinct society clause will have some indirect effect on the Charter of Rights through section 1 of the Charter of Rights. It is not possible to say for sure that it will have no effect on women's rights. It may have, but it seems to me that first, it is hard for me to imagine the use of the distinct society clause to discriminate against women. Perhaps it is possible, but it is not easy to think of examples under which the government of Quebec would want to do that, but obviously, one cannot say that it is absolutely impossible.

The other point of uncertainty in the whole picture is the point that I made earlier about section 28 of the Charter of Rights, because section 28 does, in effect, place sexual equality on a higher level than other rights guaranteed by the charter and it is quite possible that section 28 may operate as a protection for sexual equality which other rights do not have. But again, because section 28 is not entirely clear, just as the distinct society clause is not entirely clear, it is difficult to be absolutely confident about what the impact of the distinct society clause is.

Mr. Offer: If I may just continue on this line, I think in your discussion you talked about how section 28 does contain the opening phrase, "notwithstanding." Please correct me if I am reading something into your remarks that just is not there. You indicated that because of that word, "notwithstanding," that it might operate indeed above, for instance, section 1 of the charter. This is something that ought to be made clear in discussing the particular impact of the distinct society clause vis-à-vis women's rights. I am just wondering if that is a fair reading of your comment?

Dr. Hogg: Yes, that is a fair reading of my comments, that the opening words, "Notwithstanding anything in this charter" could be read as excluding even section 1 from any derogation of sexual equality. Since, in my view, the only effect of the distinct society clause comes through section 1, that would have the effect of protecting sexual equality even from the distinct society clause. I wish I could be absolutely categorical and say that is the way it is, but I do not think it is so clear that we can be absolutely certain that a court would decide that way, but I think there is a powerful argument that is correct.

Mr. Allen: I really appreciate the presentation that Professor Hogg has made. It certainly has clarified a number of matters I think if not for the rest of the committee certainly for myself and helps us as we get under way. I want to come back to part of the question that was just asked in relationship to distinct society, but I want to begin by asking you about

Mr. Allen

C-1525-2

21

February 2, 1988

language and constitutions and constitutional law over against the language of legislation in general.

Am I correct in thinking that there is some preference in constitutional law to use language of a more general nature and that constitutional law is interpreted in a somewhat different,,

C-1530-1 follows



(Mr. Allen)

begin, Professor Hogg, by asking you about what language and constitutions and constitutional law over against the language of legislation in general. Am I correct in thinking that there is some preference in constitutional law to use language of a more general nature and that constitutional law is interpreted in a somewhat different fashion than is normal with statutory law in general, and that that might affect the way in which we might look at this accord in terms of the precision we might expect or should expect? What are your views on that, because I think it does pertain to questions such as distinct society and how far you should go in trying to pin down quite exact and precise meanings in a constitutional document?

1530

Dr. Hogg: Yes, that is quite correct, Dr. Allen. What is different about a constitution as opposed to an income tax act is that it is expected to last for a very long period of time, and to cover a lot of entirely unforeseen conditions and circumstances. So the normal style of constitutional drafting is to use rather more general language than you would expect to find in an ordinary statute and to leave more to judicial interpretation than you would normally be willing to with an ordinary statute.

I think that is a fair point and it is one reason why a number of the provisions in the Meech Lake accord are a good deal vaguer than perhaps you would be willing to tolerate in a statute of the Ontario Legislature.

Mr. Allen: In fact, I think that is very important to establish, Mr. Chairman, as we look at this particular document and work our way through it.

Second, coming to the question of distinct society, for example, the Quebec protest using the override option to put the charter in effect to one side and not to recognize or be involved in all that stuff because they were not willing to recognize it and felt excluded from it--can I ask you what the significance then in that context would be of Quebec's own Charter of Human Rights and Freedoms? Because, for example, while that tendency of the Quebec government might have given some concern to various groups, whether women, multicultural, ethnic groups or what have you, specific groups in Canada at large as to a trend of action on behalf of the provincial government in Quebec, some would certainly maintain that Quebec has has a very good record vis-a-vis other provinces with respect, for example, to recognizing women's rights. Second, there is a Charter of Human Rights and Freedoms in Quebec which is very extensive and, in some respects, stronger than even the charter at some points and ??similar documents in other provinces.

So under those circumstances of putting the charter to one side in that legislation, how would that impact on recognition of similar points within Quebec's own equivalent document?

Dr. Hogg: The use of the override clause to put the charter to one side was a purely symbolic gesture because, as you say, it left in place Quebec's own Charter of Human Rights and Freedoms which is again, as you said, a more extensive guarantee of civil liberties than the Charter of Rights itself. The use of the override clause for the national charter did not signal, in any way, a disrespect for civil liberties in the province of Quebec; they were still protected by the Quebec Charter of Human Rights and Freedoms. As you rightly say, I think most observers take the view that the

Mr. Hogg

C-1530-2

23

February 2, 1988

Parti Quebecois government in Quebec and the Liberal government in Quebec have had a good record in the protection of civil liberties. So it is not really a threat to civil liberties that was involved in the use of the override clause for the charter.

Mr. Allen: Could one say that the term "distinct society" necessarily includes in its definition, when you got down to points, the Quebec Charter of Human Rights and Freedoms and the sentiments and philosophy that is embodied within it?

Mr. Hogg: That is a very interesting point. I have never put my mind to that. I have had trouble, I must say, in formulating a definition of Quebec's distinct society. But certainly the Quebec Charter of Rights and Freedoms has been in place in Quebec for a long time. I am not sure when it was introduced. The year 1965 comes to mind--

C-1535 follows



~~sh~~
~~(Mr. Allen)~~
~~-- of human rights and freedoms and the sentiments and philosophy that was~~
~~embodied in it.~~

Dr. Hogg: ~~That is a very interesting point. I have never put my mind~~
~~to that. I have had trouble. I must say in formulating a definition of Quebec's~~
~~distinct society. But certainly the Quebec Charter of Rights and Freedoms has~~
~~been in place in Quebec for a long time. I am not sure when it was introduced.~~
~~The year 1965 comes to my head, but I am not sure whether that is correct. It~~
~~predates the Charter by many years. I think it certainly provides something of~~
~~an answer to those people who fear that there will be full liberal or~~
~~oppressive legislation coming from the province of Quebec. There is no basis~~
~~whatever for that fear, other than the normal vicissitudes of politics.~~

Mr. Allen: Finally on the question of Quebec in general vis-à-vis the Constitution. We have all heard the language in the days since Meech Lake, that it is necessary to get Quebec back into the Constitution. Perhaps you could give us a few words from your view as to how far Quebec was outside the Constitution, because I sense that is not an absolute statement. How far did it get outside in the sense as a result of the rejection of 1982?

Dr. Hogg: Well of course, speaking as a lawyer, Quebec was not outside the Constitution at all since the Constitution Act, 1982 had been adopted into law by the correct procedures, which at that time was the enactment of the Parliament in the United Kingdom, that was sufficient to make it binding in Quebec and everywhere else. In all important respects the act was legal binding in Quebec.

I think that what was missing was a sense of moral or political legitimacy. The entire National Assembly of Quebec voted unanimously to reject the Constitution Act, 1982. That I think set the tone for attitudes in Quebec towards the Constitution. I think some important practical consequences did flow from that feeling of illegitimacy. One was the refusal to participate in constitutional conferences which one of the reasons was offered for the failure of the constitutional conferences to establish aboriginal self-government, was that Quebec, which has historically been sympathetic towards aboriginal claims, was not at the table. I think that was a pretty important consequence of Quebec's sense of illegitimacy.

Obviously the routine overriding of the Charter of Rights was of some importance, although as you rightly point out, the people of Quebec continued to be protected by their own Charter of Rights, so perhaps that was not as important. But, still they could not invoke the national rights of the national charter.

Other than that, I think probably the other main consequence was that it would linger as an historical grievance which if questions of sovereignty and separation were to come up again, as of course they are likely to do, they could always be invoked against Canada. "You promised us before the referendum in 1980 that there would be change to better accommodate our aspirations. That promise was never fulfilled. Why should we listen to you now?" I can see that kind of argument and it would seem to me to be a very telling and very powerful argument in the event of a further nationalist, separatist development in Quebec.

Mr. Allen: Thank you very much. I have spent my questions for now, Mr. Chairman. Could I make a procedural suggestion? Can we stay on themes? Can

we stay with distinct society questions for example and then move in that fashion? Would that be helpful in keeping our heads together around this afternoon?


Mr. Chairman: I am in the committee's hands. My next questioner is Mrs. Fawcett. Were you on the list?

Mrs. Fawcett: Yes.

Mr. Chairman: Okay, then we certainly welcome the next question.

Mrs. Fawcett: I too Dr. Hogg am very grateful for your very fine presentation.

C-1540-1 follows



~~...distinct society questions, for example, and then move in that fashion. Would that be helpful in keeping our heads together?~~

1540

~~Mr. Chairman: I am in the committee's hands. My next questioner is Mrs. Fawcett. I will table them. We certainly will for the next question.~~

Mrs. Fawcett: ~~I~~ ~~too, am very grateful for your very fine presentation.~~ In referring to this distinct society clause, to me it is a perception in the general public that the Quebec people could get more concessions or get better treatment or whatever people have in their heads, that they are sort of set apart. In that clause 2(1)(b), "the recognition that Quebec constitutes within Canada a distinct society," what would happen if you inserted the small word, "too." "The recognition that Quebec, too, constitutes, within Canada, a distinct society." What horrible legalities are involved there? But does that not mean there are other groups, like the aboriginal groups, etc., but that Quebec, too, is also distinct.

Dr. Hogg: I do not think that would give rise to any problems.

Mrs. Fawcett: Would it solve any?

Dr. Hogg: I am not sure that it would make any difference because the way I read it, I do not read it as meaning that Quebec constitutes the only distinct society within Canada. I do not think you need to read it that way.

Mrs. Fawcett: Would you agree that people are?

Dr. Hogg: I do not think that is a reasonable reading of it, particularly in the light of section 16. ??Clause 16 of the accord is the one that says nothing affects and then it lists a number of provisions but they include the provisions regarding aboriginal peoples and the provisions regarding multiculturalism. I think the intent of ??clause 16 was to reinforce the proposition that Quebec was not the only distinct society within Canada. Perhaps it is not as clear as it might be, but I think that is the best interpretation of the provisions.

Mr. Breaugh: I have a quickie on that and then I would like to move to a couple of other areas.

I cannot conceive because of the way it is laid into this agreement where the distinct society clause will in any way detract from any rights or privileges which any other group in Canada has now. Can you identify for me any theoretical ways in which such a thing could happen?

Dr. Hogg: I think the theoretical argument, and I think it is appropriate to describe it as a theoretical argument, is that Quebec might pass a law that was discriminatory in some fashion and seek to justify it through section 1 of the charter by reference to the distinct society clause. I think that is about the strongest you can put the argument.

Mr. Breaugh: Let me pursue that just a bit then. Whenever we draft a law, one of the problems that we have as legislators is to find the words that

Mr. Breugh

C-1540-2


27

February 2, 1988

actually mean your intention, that carry it out. So you reach out for words that have been used repeatedly in law before, where there is case law to establish that word really means what you think it means. But no matter how hard you work at that, once the law is finished and we as legislators pass the law, we then lose it. It goes off the court and God knows what two lawyers and judge and a court can do with what you said was a very simple concept. There is no hope in hell that we could ever draft something that had a finite meaning that was not subjected to argument before a judge, so we would be chasing an impossible task to try to define that more.

I think our concern is limited to, is there a reasonable prospect that those words will cause evil things to happen? I am looking for someone who can give me a reasonable argument that is very likely to happen and it has to be more than theoretical. They have to find for me a pretty specific case and some reasonable grounds for saying, "Wait a minute, if you actually let those words stand in this ..."

C-1545-1 follows



~~we would be chasing an impossible task to try to define that for us. So I think our concern is limited to, "Is there a reasonable prospect that those words will cause evil things to happen?" So I am looking for someone who can give me a reasonable argument that that is very likely to happen. It has got to be more than theoretical; they have to find for me a pretty specific case and some reasonable grounds for saying: "Wait a minute. Actually if those words stand in this agreement, these awful things will transpire." I am really grasping to try to find that, because I know that is a matter of some concern to a lot of groups. I cannot seem to find anything other than the most abstract, theoretical argument that would carry that.~~

Mr. Hogg: Obviously you are going to have to put that question to other witnesses, because my view is that you do end up with some pretty hypothetical and theoretical argument in order to claim that the distinct society clause is a serious threat to civil liberties in Canada.

Mr. Breagh: Ok. I want a couple of other quickies then. I cannot imagine that our current way of putting people in the Senate is so wonderful, that anybody in this nation would object to some kind of formal public process for selecting people for the Senate. Similarly--I am probably quite wrong in this--I do not believe that our system of picking judges for the Supreme Court is all that perfect that it could not stand a little public exposure either. So I really do not see much there.

What I am left with in this agreement that is bothersome to me is that there now seems to be a number of groups in our society who somehow feel, most of them, I think it not unfair to say, because they were not specifically mentioned or mentioned in the way they want to be mentioned in the accord, that they have somehow lost rights which they had just attained. In other words, there are a fair number of groups who feel that they had just got a Charter of Rights in Canada which gave to them in a law some rights. Some case were now proceeding before various levels of the courts. Then suddenly this accord rips those rights away.

My reading of what you had to say to us this afternoon is that is not true. I have to confess that in looking through both the accord and the previous attempts at writing the Constitution, I do not see where the rights have been removed. I thought I saw in my reading of the accord a pretty concerted effort to kind of make sure that no rights previously given to a Canadian citizen were removed by this. It may be stated in somewhat different ways. I would like to get your reaction to that, because I know that there will be a number of groups appearing here and that is the gist of their argument--that a right which they had just attained through the charter has now been removed or, in some way, impacted in a negative way by the accord. Again, I really have to kind of get into the theoretical before you can see that actually happening. I would like you to kind of react to that.

Mr. Hogg: My opinion of it is essentially what I see buried in your question. It seems to me that there has not been any serious impact on anybody's rights. Probably there has not been any impact on anybody's rights.

I think that there are two things which contributed to the impression that you reported. One is that because the first ministers tried to confine themselves to--and it was called the Quebec round of negotiations--the five issues that Quebec wanted to negotiate. They were not entirely successful in

Dr. Hogg

C-1545-2

29

February 2, 1988

doing that, because it spilled over into the Senate and a few other things. But generally speaking, they adopted a policy of negotiating only those five things.

Other groups have thought, "Well, by negotiating only those five things, they left us out." They did, but of course it does not stop aboriginal groups from raising again the issue of aboriginal rights and so forth, and future conferences. So I think it was the confining of the agenda to Quebec's concerns that has led to the exclusion of other perfectly legitimate reform proposals, but I do not think it took away anybody's existing rights.

Another thing that I think that has contributed to the problem is that the Meech Lake process--and it has been the same process in all previous constitutional conferences; I do not single Meech lake out--is terrible, because it is just 11 first ministers sitting around a table reaching an agreement. That is not the full story of course, because there is a long period of preparation and work by officials. But the process is a very closed one and it seems to me that if--

C-1550 follows



(Dr. Hogg)

~~..Meech Lake process, and it has been the same process in all previous constitutional conferences. I do not single out Meech Lake--is terrible because it is just 11 first ministers sitting around a table reaching an agreement. That is not the full story, of course, because there is a long period of preparations and work by officials, but the process is a very closed one, and it seems to me that if Meech Lake had been preceded by hearings of the kind that you are now holding and if groups that had concerns had had opportunities to address them before the text was finally nailed down, it seems to me that would have been a tremendous help.~~

1550

I notice that your terms of reference are not exclusively devoted to simply an analysis of the present text, but it might be desirable to consider whether future constitutional conferences ought not to be preceded by committee hearings of some kind, not necessarily Ontario hearings but national hearings, which would then, I think, make the process a bit more open and would perhaps help to deal with these very national feelings of disaffection and alienation by people who feel they had absolutely nothing to contribute to a process which may have affected them.

Mr. Breaugh: One final question: Do you think the bizarre ??means used by the first ministers to strike the deal--and I use the word "bizarre" as the most polite word I can find for it--may in effect ruin the deal in the end?

Part of what you have just said is important. If people had had a chance to appear before legislative committees and if they had had the opportunity to make a formal submission--and, in the final analysis, maybe the first ministers did disappear behind a door with their advisers and say: "This was a good idea. This is crazy,"--at least everyone would have known what the process was, had their opportunity for some input and could have said, "Well they did not love me this time, but maybe next time."

I have some concerns that the bizarre, closed-door nature of the deal itself may have given rise to all these kinds of suspicions that "we got done in, but we are not quite sure how." I would like you to comment on that because this morning we had testimony that said, "This will open up the process for change," and part of our job perhaps is to see whether we can flush that out. If there are things in here which are not as well explained as people would like, are there things we could do that would assist the process to become easier, more open and more understandable to resolve those problems?

Dr. Hogg: I certainly hope that the concerns about process do not lead to the defeat of the accord. I do agree that concerns about process probably do underly a lot of the criticism. It does seem to me though that this committee ought to do two separate and distinct things. One is to examine the text of the accord on its merit without regard for the process by which it was produced and decide whether it is good or bad. I think that a realistic assessment will be that it is good.

Second, as a completely separate matter, it would be very desirable to turn your attention to the process for the future so that the same difficulties are not repeated again. I think it would be unfortunate if what

Dr. Hogg

C-1550-2

31

February 2, 1988

is basically a well constructed accord--at least, that is my view--were to be defeated because the process by which it was produced has its faults.

Mr. Cordiano: Professor Hogg, with reference to section 16 and in the light of the "distinct society" clause--of course, there have been some criticisms about why section 16 was included. You have mentioned that and referred to that earlier in some comments in answer to a question. I just want to know whether in your opinion section 16 has equal status, if you will. The way I want to phrase it is:

Will the impact of section 16, that is, section 27 of the charter, more correctly, be diminished somehow?

C1555 follows



...question. I just want to know if, in your opinion, section 16 has equal status, if you will. Will section 16--more correctly, section 27 of the Charter of Rights and Freedoms be diminished somehow? Will its impact be diminished by the distinct society clause in any way, shape or form or do courts have to keep both those things in mind when considering legislation?

Dr. Hogg: I think one of the problems with section 16 is that it singles out just two provisions of the charter: 25 and 27.

Mr. Cordiano: Yes.

Dr. Hogg: It refers to two other provisions in the Constitution as well, but only two provisions of the charter. For example, one of the concerns of women's groups is that by singling out two sections of the charter and saying these are not affected, maybe it is saying that the others are affected. That has been our concern with section 16. I think that if section 16 is leading to that view, then it is a very unfortunate provision.

I think the reason though why it was put in was because multiculturalism and aboriginal rights seem to invoke similar distinct societies to the distinct society that is recognized in the main clause. The feeling was--to pick up Mrs. Fawcett's point--that Quebec should not be regarded as the only distinct society.

Mr. Cordiano: The fact is that section 27 of the charter does not confer a right, as I understand it. It is also an interpretive clause.

Dr. Hogg: Yes, and that is also true of section 25.

Mr. Cordiano: Right.

Dr. Hogg: So that both the provisions are not actually rights, but are simply interpretive provisions.

Mr. Cordiano: Whereas when you look at section 28, it is referring to rights and freedoms referred and guaranteed in the charter. When we are talking about sexual equality, there are definitely rights bestowed on both males and females in our society that are equal. That is what the charter is speaking to when it is referring to that section.

Dr. Hogg: It is difficult to characterize section 28 exactly because sexual equality as a right is actually contained in section 15 of the charter.

Mr. Cordiano: OK, right.

Dr. Hogg: It is possible to think of section 28 as not conferring a new right, but rather reinforcing and strengthening a right that exists elsewhere, so you might argue that section 28 is a bit like sections 27 and 25.

Mr. Cordiano: In that section.

Dr. Hogg: Yes.

Mr. Cordiano: You could argue that it is very similar to the preceding sections that refer to aboriginal rights and multicultural--

Dr. Hogg: Yes, I think you could make that argument. It is not entirely clear, but that could be argued.

Mr. Cordiano: So it is more of an interpretive section in that latter part of the charter.

Dr. Hogg: Yes.

Mr. Cordiano: OK, thank you.

Mr. Chairman: Just to be clear on that, you would argue sections 25, 27 and 28 of the charter are interpretive sections and that section 15 of the charter is the one that sets out the right.

Dr. Hogg: Yes, that is right. I would only qualify that by saying that whereas sections 25 and 27 are solely interpretive provisions, section 28 has some kind of reinforcing and strengthening effect as well as interpretive, but I do not think section 28 creates a new right.

Mr. Cordiano: But it does refer to section 15, which bestows rights on individuals, which is the fundamental difference between those sections.

Dr. Hogg: Yes, I agree.

Mr. Cordiano: When you speak about sexual equality and tying this back to the whole question of a distinct society--I am using an interpretive clause--and how that would impact on a section like 15, you have to ask yourself if that has the same power in the charter--an interpretive clause--as does one that bestows rights. I think you are saying the answer to that is no.

C-1600 follows.



~~(Mr. Cordiano)~~

~~difference between those sections~~

1600

~~Dr. Hogg: Yes, I agree.~~

~~Mr. Cordiano: So when you speak about sexual equality and then tying this back to the whole question of distinct society and using an interpretive clause and now that would impact on a section such as 15, you have to ask yourself does that have the same power in the charter. An interpretive clause is one that bestows rights and I think you are saying the answer to that is no.~~

Dr. Hogg: Yes, that is what I am saying.

Mr. Chairman: I am mindful of the clock. I have Mr. Elliot, Mr. Allen and Miss Roberts. I think I would go with those three and that would be the end.

Mr. Allen: Supplementary on that because section 16 does not simply refer to 25 and 27. It also refers to section 35 of the Constitution Act, 1982, clause 24, section 91 of the Constitution Act, 1867. Do either of those other elements lead us in any other direction?

Dr. Hogg: No. Section 35 is the provision that guarantees aboriginal rights and technically it is not part of the Charter. It was put in separately. Clause 24 of section 91 is the federal authority to legislate in relation to Indians and lands reserved for the Indians. So it is the legislative authority over aboriginal rights if you like. I suppose that section 35 and 91(24) are in there because they are linked with section 25.

Mr. Allen: Is it possible that 28 was not included because of your own observation earlier that, that clause unlike these ones, has a notwithstanding introduction to it?

Dr. Hogg: I do not know the reason why section 28 was not included in section 16.

Mr. Allen: Section 28 on the face though would seem to be a stronger statement of rights than any of the other items.

Mr. Allen: Yes. It clearly is a stronger statement and it may have been thought that it did not need the added protection of explicit reference in section 16.

Mr. Elliott: I would like to thank you too for a very informative afternoon Dr. Hogg. My question relates to the immigration aspect of the accord and beyond it perhaps just a bit. My understanding of the constitutional amendment that is proposed by Quebec is that they will be the only province with such a constitutional fact written into their part of the agreement with the federal government. The part of it that is news to me is I was not aware, with the exception of Ontario, British Columbia and Manitoba, if I note it correctly, that the other six provinces already did have an agreement with the federal government. My question is, and this may be an extension that is not in order with respect to the accord, is could you comment briefly on what the agreements might be that the other six provinces have with the federal government and particularly how they might differ from

what opportunities are given Quebec by its constitutional agreement?


Dr. Hogg: Mr. Elliott, I am embarrassed to say I do not know the answer to that. It was also news to me when I discovered and I discovered it from the testimony before the federal legislative committee that six other provinces had agreements with the federal government, because like you, I had assumed that the Cullen-Couture agreement was the only one. I have not examined the other. I have seen the Cullen-Couture agreement. I have never seen the others and I do not know what they say or how they differ. Nor do I have any idea whether they other provinces will also want to constitutionalize their agreements. I am sorry I am not helpful on that at all.

Mr. Elliott: By way of supplementary, I would like to thank you for that information because I was really trying to be a little bit lazy here and not have to do the research myself with respect to the other six agreements. Perhaps we will do it together and if I get it first I will give it to you.

Dr. Hogg: Thank you, I appreciate that.

Miss Roberts: Mine deals with the Supreme Court of Canada, if I might Professor Hogg just briefly. You indicated I believe in your discussion that someone from the territory could not be appointed to the Supreme Court of Canada. From my reading of it, and most likely I am incorrect, it would appear that as long as the person in the territory had practice and had met the qualification of section 101b. and then was admitted to a bar of a province, could indeed be appointed as long as he could convince that province to do so. So that it does not completely---

C-1605-1 follows



Miss Roberts

~~briefly, you indicated, I believe, in your discussion that someone from the Territories could not be appointed to the Supreme Court of Canada. From my reading of it and most likely I am incorrect--it would appear that as long as the person in the Territory had practice and met the qualification of 101B and then was admitted to a bar of a province, could indeed be appointed, as long as he could convince that province to do so. But it does not completely preclude them; it just means they have to go through another step.~~

Dr. Hogg: Yes. That is quite correct. If a person practicing in the Territories for a judge in the Territories, was also a member of the bar of province, then he could get on to the list of the province of which he was a member of the bar and, in that way, become eligible for appointment. I think the person who is missed out altogether is the person who is only admitted to the bar of one of the Territories and has not become admitted to the bar of a province. Of course, I suppose it might also be said that it is not terribly realistic to think a province will put forward somebody who is practicing elsewhere than in the province. But you are quite right that probably of or nearly all of the lawyers practicing in the Territories are also members of the bar of some province and could therefore technically get on to a list.

Mr. Chairman: Professor Hogg, oh, sorry. I was not sure whether you had--

Mr. Allen: I know I have asked some questions already, but I really would have ??

Mr. Chairman: That is quite all right. Go ahead.

Mr. Allen: ??Dr. Hogg's reaction to some of these questions. Excuse me, Mr. Chairman, for interrupting you.

A couple of rather quick items. I was surprised to hear you say that there is an agreement that there should be three members of the Supreme Court, by tradition, from Ontario. I knew there were to be three from the civil code background and that they were therefore normally likely to be from Quebec. Are there other apportionments on the Supreme Court that relate to other provinces?

Dr. Hogg: Yes, there are. The practice is thus; that three judges should come from Quebec. That is in the Supreme Court Act now and will be in the Constitution when the accord is ratified. Then the other places are all allocated by convention. Three go to Ontario, two go to the four western provinces, and the remaining one goes to the four Atlantic provinces. The court right now exactly mirrors that distribution.

For example, if ??Madame Justice LaFerry were to retire, the assumption would be that she would be replaced from one of the four Atlantic provinces and therefore the federal government would have four provincial lists to examine in order to replace her. So the matter is fairly strictly regulated although, as I indicated earlier, it is not cut in granite; there can be changes.

Dr. Allen: With respect to national objectives--and it has been surprising we did not get into spending power more than did this afternoon--you defined the language "national objectives" to mean simply to relate to the program in question. That is, if it was a national day care


program, then the provincial program would have to conform to that intent in order to qualify for the money. But does your language then also mean that the federal government is to say it must be a nonprofit day care program, that that becomes the national objective, or could one still establish a day care program but have it commercial and still qualify?

Mr. Hogg: I have struggled with that question myself and I do not think it is possible to give a categorical answer. I am fairly confident on the point that you started with. I am fairly confident that the only reasonable interpretation of the phrase "national objectives" is in relation to the national shared cost program. So it would have to be the objectives of the program. But how you distinguish between the objectives of the program and those aspects of the program which are incidental or means towards the objectives, I think it is difficult to give a clear answer to.

Mr. Allen: People have used the words "objectives and standards" as thought they have meant different things. Do they mean different things to you in law with respect to this kind of a consideration?

Mr. Hogg: I am not sure, because I do not think that we have used either objectives or standards in the Constitution before Meech Lake, so it is not easy to be sure whether there is a difference between the two terms--

C-1610 follows



~~Dr. Hogg:~~ towards the objectives. I think it is difficult to give a clear answer to.

1610

~~Mr. Allen:~~ People have used the words objectives and standards as though they mean different things. Do they mean different things to you in law with respect to this kind of a consideration?

Dr. Hogg: I am not sure because I do not think that we have as either objectives or standards in the Constitution before Meach Lake and so it is not easy to be sure whether there is a difference between the two terms or whether the word standards would help 106a. I am inclined to think it would be just as difficult to deal with as the word objectives.

Mr. Cordiano: Professor Hogg, could you contemplate a situation where the federal government would be in a dispute with the province, if that province had not met what it considered the national objectives? The courts would obviously have to rule on what is a national objective. But does not the federal government really have a little more force in this area because it is now being granted constitutionally, some additional powers which it did not have and which were in question? I mean it is still in question right now before the courts, because it is the federal government that is setting what will be deemed to be the national objective, where it was not doing that before constitutionally with any right.

Dr. Hogg: It seems to me it is probably the kind of thing that will get itself resolved by agreement without litigation. There has been very little litigation on the whole spending power in all the years that the federal provincial financial arrangements have been in place. It does seem to me that in the ultimate if a dispute developed with a province saying, "we are satisfying the national objectives, pay us our reasonable compensation." And, the federal government saying, "no you are not achieving the national objectives and we will not pay you your reasonable compensation." Ultimately that would have to be resolved by the courts. I think the province could sue the federal government for reasonable compensation and the court would have to make a decision and the sort of problems that Dr. Allen raises, would then have to be resolved by the court itself.

Mr. Cordiano: But, as you point out here and I am looking at your book and your remarks. Clearly the federal government has now been granted some additional rights constitutionally that it really did not have before in areas of provincial jurisdiction and thus some of the things that the federal government was doing, as is the case, as you have pointed out, have been brought before the Supreme Court and it is anybody's guess as to how the courts would rule on that. At least here there is a more definitive interpretation to what is going on than ever before. Is that a fair statement to make?

Dr. Hogg: Yes, that is true. But, what the federal government has lost, is that it does have to provide reasonable compensation to a province that fulfills the national objectives. So there has been some gain for the federal government in terms of the clarification of what was previously unclear, but there has also been some loss in terms of the obligation to provide reasonable compensation.

Mr. Allen: I am not sure that I want to draw you entirely into a

large answer to the next question, because it gets into the whole issue of Mr. Trudeau's objections to Meech Lake and that is a big issue in itself. I am puzzled by what we have heard this morning and this afternoon when one looks for example at the Trudeau white paper of 1978 for example and the subsequent bill, readiness to include the provinces in supreme court appointments and the willingness to amend the senate rather dramatically. Mr. Trudeau's own government's practice and his predecessor's Mr. Pearson, with respect to shared cost programs around Canada pension plans and governmental commitments around that vis-à-vis federal provincial roles. I found it very difficult to fathom Mr. Trudeau's objections to the statement around spending power, national programs objectives in shared cost programs and I have been wondering whether I am missing something.

It seems to me that Meech Lake really consolidates in many ways, what was the practice or hopes of those years and that government and I find it difficult therefore to understand the objection. I do not know whether you know something about this that I do not. I would be pleased to have your help with it.

Dr. Hogg: I think my reaction is exactly the same as yours, that when you trace each of the specifics of the Meech Lake accord back through the last 20 odd years of constitutional discussions, I think you can find the origins typically in matters that were---

C-1615-1 follows



~~(Mr. Allen)~~

~~...government, and I find it difficult therefore to understand the objection. I do not know whether you know something about this that I do not. I would be pleased to have your help with it.~~

Dr. Hogg: I think my reaction is exactly the same as yours. When you trace each of the specifics of the Meech Lake accord back through the last 20 odd years of constitutional discussions, I think you can find their origins typically in matters that were either agreeable to the government of Prime Minister Trudeau or had actually been the subject of agreement at the Victoria Charter, for example. There is really nothing in there that is new or unexpected, it seems to me. So I was also surprised by the vehemence of Mr. Trudeau's objection to the specific points because it seems to me there was an answer to pretty much every point that he made in the practice of his own government or in ideas that his own government had obviously offered or considered sympathetically.

I suppose the one point I thought Mr. Trudeau could have fairly made was to say, "I would not have given away all of these five matters without getting more in return." In other words, he might have been able to say: "Yes, each of these ideas were ones that my government was sympathetic to, but we would not have given them all away at once. We would have got more in return." It seems to me, reading Mr. Trudeau's testimony, that was really the only point he could fairly make and that the specifics of his criticisms were, to my mind, at least, not very cogent.

Mr. Chairman: The final, last supplementary.

Mr. Offer: Professor Hogg, with respect to the spending provision, you indicated earlier that, one, it constitutes a clarification and, two, I think you indicated that it is in fairness not without controversy. I think you have also indicated just recently that there is a give and take by both the federal and the provincial governments. I am wondering whether you can share with us your thought, taking these matters into consideration, whether this is a reasonable type of provision with respect to the spending provisions.

Dr. Hogg: I think it is entirely reasonable. You have got to remember that 106A applies only to programs that have been established in areas of exclusive provincial jurisdiction. It seems to me it is perfectly reasonable to impose some restrictions on programs in areas of exclusive provincial jurisdiction, and I notice--Dr. Allen referred to it just a minute ago--that it was the policy of the Trudeau government not to go forward with new shared cost programs in areas of provincial jurisdiction without providing compensation to opting-out provinces. That was announced in a white paper and, in fact, the Trudeau government did not establish any new shared cost programs that I can recall. So it seems to me that what 106A is doing is constitutionalizing the kind of compromise that we would have come to anyway in the design of any given shared cost program given the strong claims of the provinces to autonomy in those areas which are their own area of jurisdiction.

Mr. Chairman: Professor Hogg, you have been very good with your time. I think it is only fair, perhaps for those who have been following along with us, that I at least give your book a plug: ??Meech Lake Constitutional Accord Annotated. It is available through ??Carswell, Toronto, Calgary and Vancouver, and I am sure that your favourite local bookstore will have it.

February 2, 1988

Dr. Hogg: Are we on national television, Mr. Chairman?


Mr. Chairman: I do want to thank you very much for going through the entire agreement with us. It has been extremely helpful, as the things we have gone through today, the various things we learned this morning and what we have reviewed with you this afternoon will help get us up to steam as we proceed through this week and the ensuing weeks of testimony. So on behalf of the committee, I want to thank you very much for coming this afternoon.

Dr. Hogg: Thank you, Mr. Chairman. I very much enjoyed the opportunity.

Mr. Elliot: I have an answer to the question that we did not have an answer for before. If I could share it with the committee, I think it would be meaningful at this point.

Mr. Chairman: We are glad that you do not have to do any more work.

C1620 follows



~~Mr. Chairman:~~

~~I think we have gone through today the various things we learned this morning, what we have reviewed with you this afternoon, will help get us up to steam. We proceed through this week and the ensuing weeks of testimony. On behalf of the committee, I want to thank you very much for coming this afternoon.~~

1620

~~Dr. Hogg: Thank you, Mr. Chairman. I very much enjoyed the opportunity.~~

~~Mr. Elliot: Excuse me. I have an answer to the question that we did not have an answer for before. If I could share it with the committee, I think it would be meaningful at this point.~~

~~Mr. Chairman: We are glad you do not have to do any more work.~~

Mr. Elliot: That is right. One of the people who addressed us this morning was Don Stevenson, who is the representative to Quebec. He indicates to us that the other six agreements really are with respect to guaranteed consultation relative to target that have been established, that type of thing. The only two provinces, other than Quebec, that are thinking of constitutionalizing their agreements are Alberta and British Columbia at the present time.

Interjection: Thank you, Mr. Elliot. That is pretty helpful.

Mr. Chairman: Thank you very much. If there are no other matters before this committee, we will reconvene tomorrow morning here at 10 o'clock.

The committee adjourned at 4:20 p.m.

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(Printed as C-2)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, FEBRUARY 3, 1988

Morning Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

Witnesses:

Individual Presentations:

Baines, Beverley, Assistant Professor, Faculty of Law, Queen's University

Lederman, Dr. W. R., Professor Emeritus, Faculty of Law, Queen's University

February 3, 1988

LEGISLATIVE ASSEMBLY OF ONTARIO
STANDING COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, February 3, 1988

The committee met at 10:08 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: Good morning, ladies and gentlemen. If I could call our session to order and, just before asking Professor Baines to make her presentation, I wonder if I could ask the clerk of the committee if she would please explain how to work the interpretation devices.

Some of you are old hands at this, but there are some of us who could perhaps use some instruction. Ms. Dellor, would you explain how they work?

Clerk of the Committee: Simple.

Mr. Harris: What you do is just like what a stewardess does.

Mr. Chairman: Yes, right.

Clerk of the Committee: The dial is on channel 3 and it should not be. It should be on channel 2. OK? The red button that slides across goes from left to right and that is your volume. You just hook the little plastic piece around your ear, no problem. OK?

Mr. Chairman: Is everyone clear? Experimentation will probably be the test, I suspect.

Clerk of the Committee: If you find you have a lot of static or if it is not coming through--

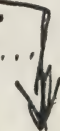
Mr. Harris: ??That is for French to English. What about those that are ??

Clerk of the Committee: No, that is whatever, in which to find ??French to English.

Mr. Harris: All right.

Mr. Chairman: Thanks very much. Professor Baines? Our first guest this morning is Professor Beverly Baines of the faculty of law, Queen's University. Professor Baines, we are very pleased that you could join us this morning. We also thank you for making available copies of your submission which will help us in dealing with the accord. I think, with that, I will turn the floor over to you and please go ahead.

~~Ms. Baines: Thank you, Mr. Chairman. Thank you for inviting me to speak to you. I understand that you had a long day yesterday and I guess you have a few more long days to come. I was particularly interested last night, ...~~



Ms. Baines: Thank you, Mr. Chairman. Thank you for inviting me to speak to you. I understand that you had a long day yesterday and I guess you have a few more long days to come. I was particularly interested last night as I read Professor Hogg's testimony, and I think when you hear what I have to say today you will find that I have a strong interest in reading the testimony of legislative committees on issues that deal with women. So I read Professor Hogg's two-and-a-half-hour testimony and I was very interested to see that you raised a lot of questions about sex equality, because that is basically what I am going to talk about today: the issue of women's charter-based equality rights in the Meech Lake accord.

I am going to read to you because I have prepared a text which I think makes the points I would like to make. It may take me some time. I apologize. I understand that people like to intervene and ask questions, but I am more than willing to take questions when I have read what I have to say. Particularly, if it is not clear, I would welcome any questions that could clarify it.

I would first of all like to provide you with some background information about myself because none of you have met me, or at least, to my knowledge, none of you have met me. When, in 1980, the federal government was in the process of drafting the charter, I was one of several women lawyers from whom the Canadian Advisory Council on the Status of Women sought advice about strengthening the sex equality provision, what is now section 15 of the charter. In 1981 I was one of many Canadian women mobilized by the Ad Hoc Committee of Canadian Women on the Constitution. As you are undoubtedly aware, the ad hoc committee was one of the women's groups responsible for the creation of section 28 of the charter.

Last summer I appeared with the National Association of Women and the Law before the federal committee on the Meech Lake accord. I also wrote a background paper on women's equality rights and the Meech Lake accord for the Canadian Advisory Council on the Status of Women. In all of these activities I have always been encouraged by the number of women who have devoted much time and energy to the cause of women's equality. In other words, I am by no means unique, nor do I claim to be.

More recently, I have written an article analysing the report of the federal committee on the Meech Lake accord. This article is supposed to be published in the Queen's Quarterly, which is a scholarly publication that comes out of Queen's University; I believe it is due for publication in another three weeks. In this article I concentrated on the portion of the federal committee report that concerns the impact of the accord on women's charter-based equality rights.

My research involved comparing the arguments which the report attributed to women who had appeared as witnesses on behalf of the national women's organizations with the testimony which these women actually gave. The women's testimony was reported in the committee's minutes, or their Hansard, making this comparative research perfectly feasible. When I compared the minutes and the report, it became obvious that the members of the federal committee had not heard—and that is the politest way I can think of putting it—the testimony of the women who appeared before them to give evidence on this issue.

More specifically, in its report the federal committee refuted three main arguments about the impact of the accord on women's charter-based



Mr. Baines

equality rights. These arguments were: First, that the "distinct society" clause should not be entrenched; second, that gender equality rights should be treated as a special case; and third, that gender equality rights should be given a guarantee of automatic paramountcy.

But as the committee minutes reveal, the women who gave evidence on behalf of the national women's organizations never made any of these arguments. Let me be specific. The women never argued that the "distinct society" clause should not be entrenched; the women never argued that gender equality rights should be treated as a special case; the women never argued that gender equality rights should be given a guarantee of automatic paramountcy, while the arguments which the women actually made were never addressed in the federal committee's report.

I do understand, by the way, from Professor Hogg's testimony, that you have been given a copy of the federal committee's report, so you can indeed verify my research if you choose.

The irony of the committee's failure to hear women's voices is that it happened in a context in which the committee was charged with the task of examining the linguistic and cultural implications of the accord.

I would be less than honest if I did not admit that my research on the federal committee report has left me sceptical about the legislative committee process. However, you are a different committee, differently constituted, and I want to credit you with open minds and, perhaps more important, a keen sense of hearing.

Here is how I propose to proceed. I am going to concentrate on the sections of the accord that relate directly to women's charter-based equality rights. That means I will concentrate on two sections of the accord, section 1 and 16. Section 1 contains the linguistic duality and "distinct,, ,

C-1015-1 follows



of the accord, sections 1 and 16. Section 1 contains the linguistic duality and "distinct society" provisions. I did notice a tendency yesterday to ignore the linguistic duality provision, but it is as important as the "distinct society" provision in section 1. Section 16 concerns aboriginal rights and the multicultural heritage of Canadians. Of these two sections, section 16 is more important to my argument. One final preliminary point, since section 1 of the accord is also known as section 2 of the Constitution Act 1867, from now on I will refer to it as section 2 to make the point that I welcome Quebec's participation in the Constitution.

Although I am not going to refer to the remaining sections of the accord, I would like to make it clear that women's groups have legitimate concerns about the provisions that refer to Senate appointments, to immigration agreements, to Supreme Court of Canada appointments, to the spending power, to the constitutional amending process, and to first ministers' conferences. Those concerns were clearly expressed in the briefs and testimony given to the federal committee, and I hope will be clearly expressed to you.

For example, the National Association of Women and the Law made a recommendation to the federal committee concerning appointments to the Supreme Court of Canada; perfectly appropriate for a women's legal organization to do that. The National Association of Women and the Law recommended, both in their written brief and oral testimony before the federal committee, that national women's groups be given the right, in addition to the provinces, to recommend names for vacancies which occur in the Supreme Court of Canada. In passing, I am somewhat surprised to note that in his recently published booklet on the Meech Lake Constitutional Accord Annotated, Professor Hogg failed to make any reference to this well-documented recommendation by the National Association of Women and the Law, although he did refer expressly to the recommendations about Supreme Court of Canada appointments that had emanated from the Canadian Bar Association and the Canadian Association of Law Teachers.

However, much as I might like to continue to refer to the legitimate concerns raised by the other provisions of the accord, I intend to confine my remarks to sections 2 and 16 because there is more than enough to say about those sections. Put simply, my research suggests that section 2 and section 16 of the accord put women's charter-based equality rights in jeopardy. More specifically, given the existence of sections 2 and 16 of the accord, the source of the problem is the absence of any reference in the accord to women's charter-based equality rights.

Initially, I thought this omission was due to yet another oversight on the part of the first ministers. I remembered that their predecessors had forgotten about the existence of section 28 of the charter when they were negotiating the charter's override clause in November 1981, but I no longer believe that the first ministers forgot about women's charter-based equality rights when they were negotiating the Meech Lake accord last summer.

In the first place, we know that the first ministers did consider the question of whether to exempt the whole charter. We know this from the testimony given to the federal Meech Lake committee and recorded in the minutes of the last day of the hearing by Norman Spector, who is the Secretary to the Cabinet for Federal-Provincial Relations. Mr. Spector was present in the room when the first ministers were negotiating the terms of the accord on the night of June 22-23. According to his testimony, after the first ministers

Ms. Baines

C-1015-2

5

February 3, 1988

had agreed to include the aboriginal and multicultural provisions in the accord in section 16, "the issue came up of whether the entire charter was exempted." As Mr. Spector put it, "That option was rejected, because it was not acceptable and it was a deal-breaker." So we know that the first ministers were not prepared to exempt the whole charter, although they were prepared to exempt the aboriginal and multicultural provisions.

No evidence was given to the federal committee about any specific discussion of women's charter-based equality rights, but rampant rumour has it that there was such a discussion. The rumour is that the first ministers decided to protect the aboriginal peoples and multiculturalism but not women, for--and here I draw again on Mr. Spector's testimony to the federal committee--"political reasons." I have speculated...

C-1020-1 follows



6 February 3, 1988

(Ms. Baines)

1020

~~No evidence was given to the federal committee about any specific discussion of women's charter-based equality rights, but I am sure that there was such a discussion. The rumour is that the first minister decided to protect the aboriginal peoples and multiculturalism but not women, for and here I draw again on Mr. Spector's testimony to the federal committee "political reasons." I have speculated about the nature of those "political reasons" because Mr. Spector did not elaborate.~~

It is possible that by "political reasons" they meant to suggest that women should have lobbied for inclusion in the accord before the Ottawa meeting. If so, there is a major problem with that suggestion. Unlike the aboriginal and multicultural lobbies, the women's lobby was not represented by any concerned insiders during the accord negotiations. Thus women were never warned when the first ministers decided to change the terms of the accord--and I am referring specifically to deciding to create section 16--between their Meech Lake and Ottawa meetings. And so the women's lobby had no way of knowing that their efforts were required before the Ottawa meeting.

Alternatively, it is also possible that the phrase "political reasons" was meant to suggest that women had already achieved equality, perhaps to suggest that we were just being uppity in demanding more. If so, then those who subscribe to this suggestion should look around them. Were they to read the fact sheets issued by the Ontario women's Directorate, they would have to acknowledge that women are a long way from achieving gender equality.

These fact sheets show that women are ghettoized in employment. In 1984, the fact sheets show 59.5 per cent of Canadian women in the labour force were concentrated in clerical, sales and service sector jobs which were generally low paid. By contrast only 26 per cent of men were employed in these occupations. These fact sheets also show the income differentials between women and men. In 1982 women working full time in Canada earned 62.2 per cent of what men earned. As well, these fact sheets show other labour force and income differentials.

For example, in Canada, 64 per cent of women report that they suffer work interruptions because of their parenting and marriage responsibilities, while less than one per cent of men report that their work suffers interruptions because of similar obligations. Licensed child care in centres and family homes provide 171,654 spaces in Canada. If a licensed space was available for each child of working parents, it is estimated that 1,950,000 spaces would be needed.

Women in the labour force perform twice as many hours of family and home care duties as men. Only 39 per cent of working women as compared to 54 per cent of working men are covered by a private pension plan. Moreover, the fact sheets issued by the women's directorate reveal inequities in the family area. For example, women comprise 83 per cent of single parent families in Ontario. Divorced men experience an average 42 per cent rise in their standard of living in the first year after divorce, while divorced women, and their children, experience a 73 per cent decline. Forty three per cent of single parent female-headed families have incomes below the poverty line. Less than 14 per cent of single parent male-headed families are below the poverty line.

Ms. Baines

C-1020-2

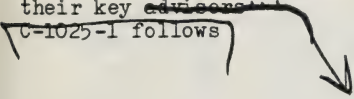
~~8~~ 7 February 3, 1988

I have noted those facts. I think probably many of you are aware of them because they are on the Ontario Women's Directorate fact sheets, but I think the exemplify how women do not yet have equality in Canada or in Ontario.

Anyone who has thought about gender equality would also have to recognize that as long as women are so vulnerable to sexual assault, wife battering, sexual harassment and pornographic degradation, there is no question of equality being achieved or even approximated. Under these circumstances, how could anyone imagine that we have achieved sex equality? Perhaps it is because the charter provides for sex equality, but merely because the law provides for equality--even if it is a constitutional law such as the charter--does not make life as we must live it an egalitarian experience for women.

So, when I try to understand the "political reasons" that led the first ministers to protect the rights of aboriginal and multicultural peoples in the accord, while at the same time denying women that protection, here is what I conclude. I conclude that what started as the "Quebec round" of constitutional negotiations became, at that moment of denial, the "men's round." There may have been one, or even two, women in the room with the first ministers and their key advisors.

C-1025-1 follows



(Ms. Baines)

~~... started as the Quebec round of constitutional negotiations became, at that moment of denial, the men's round. There may have been one, or even two women in the room with the first ministers and their key advisers. That does not make the decision any less gendered. When an overwhelming preponderance of the decision makers are both powerful and male, and those powerful male decision makers decide to deny women protection already accorded to aboriginal and multicultural peoples, then that decision is gendered, and the Meech Lake accord is properly referred to as the men's round.~~

Now I would like to move from the context that surrounded the exclusion of women's charter-based equality rights to the legal arguments that support the inclusion of these rights in the accord. There are two main issues which must be addressed in order to support the conclusion that women's charter-based rights must be included in the accord. The first of these legal issues involves explaining the relationship between the accord and the Charter of Rights. More specifically, this first issue involves an explanation of the relationship between section 2, that is the linguistic duality and the "distinct society" provisions of the accord, and sections 15 and 28, the sex equality provisions of the charter. The second legal issue involves explaining the meaning of section 16, the aboriginal and multicultural provision of the accord.

Turning to the first issue, there are four possible ways of explaining the relationship between the accord and the charter. The charter may override the accord; two, the charter may not apply to the accord; three, the accord may override the charter; four, the interests of the accord and of the charter may balance each other out, making the outcome of any particular controversy dependent on a particular circumstances of that controversy. I will examine each of these explanations in turn. In doing so, I would like to note that I am not addressing the question of which of these relationships should prevail. Rather, my objective is to explain which relationship does prevail. In order to research this question, I relied mainly, although not entirely, on the testimony of the legal academics and lawyers who appeared before the federal committee and whose evidence was recorded in the committee minutes.

Interestingly enough, when I did my research I could not find anyone who argued that the charter overrode the linguistic duality and "distinct society" provisions of the accord. However, Professor Hogg, who did not appear before the federal committee, has stated in his new booklet, "section 2 is subordinate to the charter." Although he might interpret as meaning that the charter overrides the accord, I rather doubt that he would approve of that interpretation, because it would not be consistent with his later argument about reading section 2 of the accord with section 1 of the charter to, as he put it, "expand the power of Parliament or a Legislature to derogate from the charter." Accordingly, I think it is fairly safe to conclude that no one argues that the charter overrides the accord.

Now, I want to take the next two explanations of the relationship between the accord and the charter, that is the explanation that the charter may not apply to the accord, and the explanation that the accord overrides the charter, together for reasons which will become apparent in a moment. As I researched the minutes of the federal committee, I found that all of the women academics and lawyers who appeared before that committee on behalf of the national women's organizations, raised the issue of whether the charter applied to section 2 of the accord. Moreover, these women also went on to argue that the charter might not apply to section 2 of the accord, given the

Ms. Baines

C-1025-2

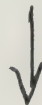
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February 3, 1988

decision of the Supreme Court of Canada in the Ontario separate school funding case. In that case, the court found that the separate school education provision, section 93 of the Constitution Act 1867, was immune from invalidation by the charter. If section 93 was immune from charter invalidation, the women reasoned, might not the linguistic duality and "distinct society" provisions also be immune from charter invalidation?

One or two of the men who appeared before the federal committee agreed that the charter might not apply to section 2 of the accord because of the ...

1030-1 follows



(Ms. Baines)

Immune from Charter Invalidation.

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~~One of two of the men who appeared before the federal committee agreed that the charter might not apply to section 2 of the accord because of the decision in the Ontario separate school funding case, but most of the male academics and lawyers argued that the women were wrong, and when they did, these men also asserted that the accord did not override the charter. Indeed, Professor Hogg has made the same assertion in his new booklet. At first I found the men's assertion about the accord not overriding the charter somewhat peculiar, given that I could not find anyone who was arguing that the accord did override the charter.~~

However, I have recently come to the conclusion that when the men argue that the accord does not override the charter, they are actually addressing the women's argument about the charter not applying to section 2 of the accord. In other words, the men have collapsed the second and third explanations of the relationship between the charter and the accord, namely, the explanations that the charter may not apply to the accord and the explanation that the accord overrides the charter into their own uniquely negative assertion about the accord not overriding the charter.

Now, the important question is not whether these two explanations should or should not be collapsed, but rather whether the men can sustain their assertion that the accord does not override the charter. Clearly, they cannot sustain that assertion without explaining the decision of the Supreme Court of Canada in the Ontario separate school funding case. Interestingly enough, when these men explain the decision in the Ontario separate school funding case, they offer more than one interpretation of that case. However, mostly they offer either the interpretation provided by Professor Lederman in his article in the Financial Post, or the interpretation provided by Professor Hogg in his new booklet.

According to Professor Lederman's interpretation, the decision in the Ontario separate school funding case, should be restricted to the precise laws and facts with which that case was concerned. Since the decision concerns section 93 of the Constitution Act, 1867, this would mean that only section 93 would be immune from charter invalidation. Professor Hogg's interpretation is only marginally less restrictive than Professor Lederman. Professor Hogg would restrict immunity from charter invalidation to other constitutional provisions that are inherently discriminatory.


Needless to say, Professor Hogg does not believe that the linguistic duality and "distinct society" provisions are inherently discriminatory, and he says this in his new booklet. As well, I should note that Professor Hogg shares his restrictive interpretation of the decision in the Ontario separate school funding case with the majority members of the federal Meech Lake committee. In the federal committee report, this interpretation was attributed in turn to the minority judgement of Mr. Justice Estey in the Ontario separate school funding case.

Therein lies the problem with both of these interpretations. Both do violence to the majority judgement in the Ontario separate school funding case. That majority judgement was written by Madam Justice Wilson and concurred in by the Chief Justice and Justices McIntyre and LaForet. Since Madam Justice

Wilson does not write about inherently discriminatory legislation, and since she is writing the majority judgement, arguments about restricting the decision to other inherently discriminatory laws, are not made from a position of strength. Moreover, Madam Justice Wilson also provided a full and complete answer to those who would subscribe to Professor Lederman's very restrictive interpretation of her decision when she wrote, "It was never intended, in my opinion, that the charter could be used to invalidate other provisions of the Constitutions, particularly a provision such as section 93, which represented a fundamental part of the Confederation compromise."

According to Madam Justice Wilson, therefore, the test of whether a constitutional provision is immune from charter invalidation is whether the provision represents a fundamental part of the Confederation compromise. Moreover, it would appear that her test could be applied to the linguistic ...

1035-1 follows



Wilson, therefore, the test of whether a constitutional provision is immune from charter invalidation is whether the provision represents a fundamental part of the Confederation compromise. Moreover, it would appear that he could be applied to the linguistic duality and "distinct society" provisions of the accord. The very fact that the first ministers opted to lodge the linguistic duality and "distinct society" provisions back in the historic Constitution Act, 1867 would suggest that these provisions could qualify as a fundamental part of the Confederation compromise. Indeed, there seems to be no other logical reason for opting to lodge these particular provisions in the 1867 Constitution Act and thereby to rewrite the history of the Canadian Constitution in the process.

If I am right in my interpretation of, and reliance on, Madame Justice Wilson's decision in the Ontario Separate School Funding case, then it is impossible to argue conclusively, as the men try to do, that the accord does not override the charter. But it is possible to sustain the women's argument that the charter may not apply to the accord, given Madame Justice Wilson's decision. The women's argument only needs to be persuasive and not conclusive in order to sustain the conclusion that the accord puts women's charter-based equality rights at risk.

Let me move on to the final explanation of the relationship between the accord and the charter. According to this explanation, the relationship is one of a balancing of the interests at stake in each particular controversy. Many people advance this argument, mostly by reading section 2 of the accord with section 1 of the charter, as Professor Hogg suggested to you yesterday. Now this explanation makes it difficult, if not impossible, to predict the outcome of any particular confrontation between a section 15 sex equality claim and a section 1 read with section 2 linguistic duality or distinct society limitation. What is predictable is that having to balance our charter interests against the limitations of the accord in each particular controversy means more money for lawyers and more problems for women claimants.

Moreover, what everyone seems to forget--and I am pleased to note that Professor Hogg did not forget it yesterday--is that in a conventional section 15 sex equality case, the balancing does not end by relating sections 15 and 1 of the charter. Rather, in a conventional sex equality case, even if the court decides to impose a section 1 limitation, there is still one further step which must be taken. The court must consider whether section 28, that is, the second sex equality provision in the charter, has a countervailing effect on section 1.

In other words, because section 28 begins with a notwithstanding clause, it may have the effect of countering the impact of the section 1 limitation. Although there is not enough jurisprudence on section 28 to know with certainty whether it has this impact, it is clear from the history of the creation of section 28, that its intended function was to provide relief against section 1.

The problem which the accord poses relative to section 28 is not that we do not know with certainty how section 28 will be interpreted. Clearly we do not. I have looked at the jurisprudence on section 28 and I can speak about it later if you would like me to. We created section 28--indeed, I often think of section 28 as a women's equality provision because it was women who lobbied for its creation--and we will litigate our interpretation of section 28 as the

Ms. Baines

C-1035-2

~~11~~ 13

February 3, 1988

appropriate cases arise.

In other words, the members of the federal Meech Lake committee were completely off base when they concluded that our problems lay with the charter and not with the accord. We made no such argument about the charter sex equality provisions. Indeed, section 15 of the charter has been in effect for less than three years and the Supreme Court of Canada has not yet even rendered its first decision on the sex equality provisions. The closest that the Supreme Court of Canada has come to deciding a ~~charter~~

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~~Indeed, section 19 of the charter has been in effect for less than three years and the Supreme Court of Canada has not yet even rendered its first decision on the sex equality provisions. The closest that the Supreme Court of Canada has come to deciding a charter-based sex equality case happened in the Blainey case when the court simply refused leave to appeal, thereby upholding the decision of the Ontario Court of Appeal to the effect that section 19(2) of the Ontario Human Rights Code was invalid. But in so doing, the court did not have to give any reasons for its decision, and in so doing of course, the Supreme Court of Canada did not tell us the meaning of the sex equality provisions in the charter.~~

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We do not know for sure whether the court would adopt the Ontario Court of Appeal's meaning and, I suggest, that the Ontario Court of Appeal was not exactly clear in delineating the meaning of the sex equality provisions in the Blainey case, which is not to take away from the outcome. The outcome is just fine, in my opinion.

It is not the charter but the accord that poses a major problem in relation to section 28. It is the accord, and more particularly section 16 of the accord, that precludes the effective operation of section 28 in the context of what would otherwise be a balancing of the interests of the charter and the accord.

Accordingly, this brings me to the second legal issue, that of the meaning that is to be attributed to section 16 of the accord. As you are aware, section 16 provides that nothing in the linguistic duality and "distinct society" provisions affects the charter-and-Constitution-based rights--and I use the word "right" advisedly there--of the aboriginal peoples and the charter-based rights of the multicultural peoples.

Neither the aboriginal nor the multicultural peoples find section 16 particularly satisfying; from the perspective of women, however, section 16 is downright dangerous. By naming the aboriginal and multicultural peoples with such specificity--and this is done by referring to the specific sections of the charter and the Constitution Acts that cover the aboriginal and multicultural peoples, which brings to mind one of the questions that was raised yesterday to Professor Hogg about constitutions being drafted in general language. That is true and the accord is drafted in general language, except for section 16, which very specifically names four sections of the charter and the Constitution Acts that are not affected by section 2 of the accord--By naming those groups with such specificity, section 16 leaves open the very real possibility of a judicial decision that could preclude making its protection available to any unnamed groups, such as women.

In other words, section 16 creates a hierarchy of rights that did not exist under the charter. In so doing, section 16, in effect, nullifies any impact which a strengthened interpretation of section 28 might give us in the balancing of the accord and the charter.

Moreover, section 16 creates this hierarchy of rights among aboriginal, multicultural, distinct society, linguistic duality and women. Section 16 creates this hierarchy of rights irrationally. Significantly, the members of the federal Meech Lake committee acknowledged the irrationality of the

Ms. Baines

C-1040-2

~~14~~ 15 February 3, 1988

hierarchy of rights created by section 16 when they reported that--and I quote from their report--"Various distinguished constitutional experts...had great difficulty in providing a legal rationalization as to why certain sections are included in section 16 and why others are left out."

I should note that the federal report also rejected the argument that section 16 could be explained as an interpretation clause that did not cover subsections involving rights. They did indeed acknowledge, as I think Professor Hogg did yestereay, that the aboriginal peoples and the multicultural peoples would be quite distressed to learn that some people were trying to suggest that their charter provisions and their Constitutional provisions did not give them ant rights.

That being said, to the extent that any explanation of the groups included in section 16 has been forthcoming, therefore, it has issued from--

C-1045 follows



(Ms. Baines)

~~cultural peoples would be quite distressed to learn that some people were trying to suggest that their charter and constitutional provisions did not give them any rights.~~

~~That being said, to the extent that any explanation of the group included in section 16 has been forthcoming, therefore, it has issued from the federal Minister of State for federal-provincial relations when he said in his testimony before the federal committee that "the various references to aboriginal peoples relate to collective rights" and also that "because multiculturalism and native peoples related to groups with a cultural aspect, it was thought appropriate to put in that nonderogation clause," that nonderogation clause being section 16.~~

However, women can accommodate the federal minister's explanation with no difficulty. Women can demonstrate that they share collective or group rights by pointing to cases such as the Canadian National's affirmative action case which was decided recently by the Supreme Court of Canada and held that women as a group were disadvantaged by CN's hiring practices, hence requiring CN to impose an affirmative action policy.

Also there is the Federation of Women Teachers Association of Ontario case, which has only been heard and decided at the trial level thus far and is being litigated in the Ontario court system where indeed the court has decided that a women teachers' organization is valid under the Constitution.

Women can also point to scholarly writing such as that by psychologist Carol Gilligan and sociologist Jessie Bernard to make the case for a women's culture. Thus women can claim they share the collective and cultural characteristics that apparently led to the inclusion of the aboriginal and the multicultural peoples in section 16.

In passing, I should note that it is this claim of similarity to the aboriginal and multicultural peoples that refutes the federal Meech Lake committee's allegation that women were making a case for special treatment. We claimed similarity, not specialness.

In fact, the case for special treatment was forced upon us when the federal committee persisted in demanding examples showing that the linguistic duality and distinct society provisions could have a negative effect on women's charter-based equality rights. No such demands were made of the aboriginal and multicultural peoples before they were included in section 16 of the accord. Nor should such demands have been made of women after we demonstrated that in this context our collective and cultural needs are analogous to those of the aboriginal and multicultural peoples.

With hindsight I can say that we were foolish to provide the examples which the federal committee demanded; and yet provide them we did, copiously. The National Association of Women and the Law provided examples in the areas of population control, reproduction, parental benefits, educational and economic opportunities and subsidized housing.

LEAF, that is, the women's Legal Education and Action Fund, provided examples involving abortion, education and employment. The ??National Action Committee on the Status of Women provided a very powerful example in the area

Ms. Baines

C-1045-2

17

February 3, 1988

of immigration. The ??Ad Hoc Committee of Canadian Women on the Constitution provided the legal opinion of Mary Eberts and John Laskin containng examples involving affirmative action, day care, communal land-holding, birth control and spousal consent provisions in the Ontario Family Law Act.

Even now, I could draw on the recent Morgentaler decision to suggest yet another example involviong possible federal legilslation that might adopt a trimester-based approach to abortion. I do not advocate that approach, I do not advocate federal legislation in this area, but I could foresee the possibility, and it is not, I suspect, that remote a possibility. Were the federal government to react to the Morgentaler decision by enacting trimester-based legislation and were Quebec to adopt either a more liberal, as is more likely, given Quebec's--

C1050 follows



(Ms. Baines)

...as is more likely, given Quebec's record on the abortion issue or, alternatively, a more conservative approach to trimesterization, then Ontario would feel the impact, either because Ontario women might resort to the more liberal facilities in Quebec, in one scenario, or, alternatively, because Quebec women might resort to the less conservative facilities in Ontario, in the second scenario.

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My point is that there are many examples of the potential for conflict between the accord and women's charter-based equality rights. Those examples are not limited to Quebec, although I note that in your questioning yesterday, you and Professor Hogg appeared to limit your examples to Quebec. Any provincial government--and Professor Hogg did note this--or the federal government could pass legislation pertaining to the linguistic duality provision and, as he went on to say, it is not beyond the realm of possibility that a government other than Quebec might try to avail itself of the "distinct society" provision despite the explicit wording of the provision, as Professor Hogg noted, by arguing inferentially that if Quebec is a distinct society, then it must be distinct from some other distinct society, namely, the other government that is trying to pass the legislation under that provision. I am not advocating such an extension of the "distinct society" provision. I simply point out, as Professor Hogg did yesterday, that such claims would be possible. I particularly think it might be possible, for example, in the context of the abortion issue right now and British Columbia's position on therapeutic abortion committees and failing to fund abortions. Now I do not want to advocate this for BC. I think it is possible.

Now I want to report to you that the members of the federal Meech Lake committee dismissed all of our examples as "hypothetical possibilities." I ask you, what other kind of examples could we have offered? We all know that most governments tried to clean up their legislation during the three-year hiatus between the coming into effect of the charter and the coming into effect of section 15 of the charter. You had varying degrees of success, but we also know that the future may bring egalitarian legislation, particularly in the realms of population control, reproduction and affirmative action. And yet the federal committee would not have us take preventive steps now because we could only hypothesize or theorize about the future.

Moreover, there was a certain inconsistency in the federal committee's report with respect to who could hypothesize about the future. According to the committee, women could not hypothesize about future possible conflicts, but when Professor Hogg did so, he was quoted with approval. All of this leads me to take the position that exemplification of possible conflicts is irrelevant in this context. What is relevant is that women's charter-based equality rights are analogous to those of the other groups, the aboriginal and multicultural peoples that are included in section 16.

This brings me to my final argument about section 16. Professor Lederman has asserted in his Financial Post article that "section 16 is superfluous." Of this assertion, I have written in a subsequent Financial Post article, to quote myself if I may:

"No court has so ruled. Indeed the courts have strenuously resisted

Ms. Baines

C-1050-2

~~1988~~ 19

February 3, 1988

redundancy arguments, at least in the context of the general equality rights section, section 15, of the charter. There the question has been whether the 'without discrimination' phrase is redundant given that it is preceded by various 'equality' phrases. Although the Supreme Court of Canada has yet to rule on this question, at least four courts of appeal in various provinces have expended considerable effort and verbiage on it. Surely we could expect--

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(Ms. Baines)

~~equality rights section, section 15 of the charter. There the question has been whether the "without discrimination" phrase is redundant, given that it is preceded by various equality phrases. Although the Supreme Court of Canada has yet to rule on this question, at least four courts of appeal in various provinces have expended considerable effort and verbiage on it. Surely we could expect that at least as much effort might be expended on a whole section, namely section 16 of the accord. I do not think that the courts will find section 16 superfluous.~~

To Professor Hogg, who asserts that section 16 is, and I quote from his booklet, "a cautionary provision designed to reassure native peoples and other ethnic, linguistic or cultural communities, that the recognition of linguistic duality and Quebec's distinct society is not inconsistent with the protection of other distinct communities in Canada." My response is to state categorically that the historic and contemporary treatment of Canadian women, mandates the same cautionary approach. My legal arguments now made, what do I recommend?

First, let me review the range of recommendations that were made to the federal committee on this issue. The National Action Committee on the status of women recommended that section 28 of the charter be included in section 16 of the accord. They noted clearly that that was a compromise which they as a national umbrella organization had achieved by consulting all of their constituencies. The National Association of Women and the Law, which also consulted its members from across Canada recommended that the sex equality rights in sections 15 and 28 of the charter, be included in section 16 of the accord.

The Womens' Legal Education and Action Fund recommended that sections 15 and 28 of the charter be included in section 16 of the accord. The Canadian Advisory Council on the Status of Women recommended that the whole charter be inserted as an interpretation clause in section 2 of the accord and in the paper that I wrote for the Canadian Advisory Council on the Status of Women, I provided background research to support that recommendation.

What all of these recommendations had in common was that section 28 be included in the accord. I note in passing that the Fédération des femmes du Québec, the largest women's organization in Quebec, testified before the federal Meech Lake committee that they would not oppose the inclusion of section 28 in section 16 of the accord.

My recommendation is therefore, that the starting point must be the inclusion of 28 in the accord. However, I find it difficult to stop with the inclusion of section 28, because I have researched the recent section 28 jurisprudence only to find that the courts consistently read section 28 with another section of the charter. Indeed, we have an Ontario Court of Appeal decision in a case called Lucas and Neely, in which the Ontario Court of Appeal states that section 28 must be read with other sections of the charter.

I should note to you that section 28 does not necessarily have to be read with section 15 of the charter. There are other court decisions indicating that section 28 could be read with any other provision of the charter.

So, if caution is the key to the accord, and Professor Hogg's analysis of section 16 suggests that it is, then we must include not only section 28,

Ms. Saines

C-1055-2

21

February 3, 1988

but also the rest of the charter. That said, I realize that the idea of including the whole charter in the accord has met with quite a range of responses from Mr. Spector's aforementioned and pessimistic "deal-breaker" reference to the more progressive statement by the Quebec Minister of Intergovernmental Relations at Mont Gabriel in May 1986, to the effect that, and I quote the minister, "the Charter of Rights and Freedoms is on the whole a document which---

C-1100-1 follows



48 22 February 3, 1988

(Ms. Baines)

~~from Mr. Spector's aforementioned and pessimistic "deal breaker" reference to the more progressive statement by the Quebec Minister of Intergovernmental Relations at Mont Gabriel in May 1986 to the effect that, and I quote the minister, "the Charter of Rights and Freedoms is on the whole a document which we as Quebecers and Canadians can be proud of."~~ There would seem to be some question as to which governments do not want the charter included in the accord. It certainly is not clear to me that the Quebec government is the problem.

1100

I have one final recommendation for the members of this committee. You are just beginning to hear the complex and controversial legal arguments that will continue to be advanced on this matter. Whether you are a lawyer or even a constitutional lawyer or neither, there will be no denying the complexity and the controversiality of the legal arguments that you will hear. So, if you find that you can hear but not resolve the argument that the accord puts women's charter based equality rights at risk, you have an honourable alternative to recommending or refusing to recommend a change in the accord.

You could recommend that the Ontario government direct a reference case to the courts to resolve the question, which is really a judicial question anyway, of whether the accord puts women's charter based equality rights at risk. I would be delighted to have a higher court ruling that says I am wrong. I would also be surprised. I am willing to have that happen before the accord becomes constitutional law in Canada. Afterwards there will be too much harm that could be caused.

There is certainly recent precedent for directing such a reference case. The precedent exists in the form of the constitutional reference case in 1981 when three provincial governments were unsure of the rights of the other governments to put the charter into effect.

There is also a more poignant historical precedent for women in the context of the reference case on behalf of women that occurred in 1928, the Persons reference case, where the Supreme Court of Canada ruled that women were not persons for purpose of appointment to the senate, but the then highest Court of Appeal, the British committee of the judicial privy counsel, ruled that women were persons, to our everlasting delight.

Moreover, there is some indication that at least one other government is at the moment taking seriously the possibility of directing a reference on this matter to the courts. I only advocate the reference case if you find that you cannot resolve to your satisfaction the question of whether the accord puts women's charter based equality rights at risk. If you feel that we are persuasive in making that argument, then please make a recommendation for changing the accord.

Mr. Chairman: Thank you very much professor. That was a very thorough paper and we are indebted to you for spending clearly the time and patience in putting it together. I think you raise a number of fundamental issues. We will now try to hear some questions perhaps to clarify some points in our own mind.

I wonder if I could exercise the prerogative of the chair and lead off. I want to be very clear on one point that you made and that is with respect to

women outside of Quebec, you are arguing that while women in Quebec would be most directly and particularly affected, that in your view there are a number of matters whereby whatever might happen or whatever interpretation might be given by the court, that in point of fact the accord as it now stands could effect in a negative way women throughout the country in terms of different kinds of programs that might be developed. Is that a fair statement?

Ms. Baines: The major point of my argument would be to make an argument for women outside of Quebec. I personally believe that the women in Quebec can make their own arguments with respect to the Quebec government. Indeed, when they appeared in front of the federal committee---

C-1105-1 follows



~~(Mr. Chairman)~~

~~by whatever might happen or whatever interpretation might be given by the court that in point of fact the accord as it now stands could affect in a negative way women throughout the country in terms of different kinds of programs that might be developed. Is that a fair statement?~~

Ms. Baines: ~~The major point of my argument would be to make an argument for women outside of Quebec. I personally believe that the women in Quebec can make their own arguments with respect to the Quebec government. Indeed, when they appeared in front of the federal committee, they were very clear about the good relationship they had with the politicians in Quebec. I did not note the anglophone women making the same argument.~~

However, speaking as a woman outside of Quebec, I am speaking basically about the concerns that we outside of Quebec would raise about arguments that could be made under the "linguistic duality" clause and also under the "distinct society" provision should we be in the position where a government outside Quebec tried to rely on it or a government outside Quebec tried to refuse our request for equality treatment, such as in the abortion example, by saying, "Of course Quebec can be more liberal, but we in Ontario cannot because we do not have that right to do so under the 'distinct society' clause."

I would not presume for a moment to speak for Quebec women.

Mr. Chairman: I was not trying to suggest that you were. I just wanted to be clear that one of the concerns here is that this accord would have the potential to affect all women in Canada.

Ms. Baines: Absolutely.

Mr. Chairman: I wanted to be clear on that point.

Ms. Baines: Absolutely. We agree.

Mr. Cordiano: Thank you, Professor Baines. You certainly have raised a number of complex questions and issues.

I am neither a lawyer nor a constitutional lawyer, so I will attempt to clarify some points, if you will, for me. What I am interested in is when you were talking about multicultural peoples, you say on page 8 of your brief, "??"...that led the first ministers to protect the rights of aboriginal and multicultural peoples." I recall you said, "I use the word advisedly," that is, the rights of multicultural peoples. Can you elaborate on what you meant by that and why you said you would use the term advisedly?

Ms. Baines: I said that I would use the term advisedly in the context of the aboriginal peoples. I was referring specifically to section 25 of the charter, section 35 of the Constitution Act 1982 and subsection 91(24) of the Constitution Act 1867. I would say very specifically that those people feel that they have rights from those three sections.

The question about the section that the multicultural peoples rely on is a question that is open to more interpretation, if you will. The clause itself has the word "interpreted" or "interpretation" in it. So it would appear that it could be read as an interpretation clause and some challenge could be made

Ms. Baines

C-1105-2

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February 3, 1988

to the question of whether it is a rights-bearing clause.

I think though if you ask the multicultural peoples themselves, in other words, those people who would rely on section 27 of the charter, you would find them being quite concerned and surprised if you said to them, "That section does not give you any rights." I think what it does is give them rights in connection with the specific groups that are mentioned in section 15 of the charter.

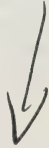
Mr. Cordiano: What is your definition of "multicultural peoples?"

Ms. Baines: That is a hard one to answer. I think that others with more background on that question than I have tried to answer it. I think I would prefer to refer you to a book that has come out called Multiculturalism and the Charter, where studies have been made and information has been produced on that particular issue.

I think there are many categories that could be included in it, but at minimum I think it would incorporate some of the sections of section 15, including for example race, national or ethnic origin. What are the other sections? It might include a religious classification. I am thinking now in terms of the provisions of section 15 and those are the categories that I would include in section 27.

Mr. Cordiano: I would just venture to say that as politicians we certainly make mention or use of the fact that we have a multicultural society. Certainly for some period of time anyway in our country, we generally have an agreement on what more or less multiculturalism means to people. I think we are approaching the view--and have for a number of years anyway, in my opinion--that multiculturalism implies that all Canadians come from some background or heritage. In fact, when I look at section 27 of the charter...

C-1110 follows



(Mr. Cordiano)

~~for some period of time anyway in our country, we generally have an agreement on what more or less multiculturalism means to people. I think we are approaching the view--and have for a number of years anyway, in my opinion--that multiculturalism implies that all Canadians come from some background or heritage.~~

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In fact, when I look at section 27 of the charter, the words are very clear. It refers to the preservation and enhancement of the multicultural heritage of Canadians, which I would take to mean all Canadians. Therefore, I would think in that section all Canadians are included. I do not know about the section with reference to it being an interpretive clause or a rights-bearing clause. I am not going to ask you about that. I will leave that to the legal experts to decide. But I think there is some merit in saying that all Canadians are included in that section. Would that be correct to say, in your opinion?

Ms. Baines: Yes, it would.

Mr. Allen: I would like to express my appreciation to Professor Baines for taking us through our first really close study of some particular aspect of the accord as it relates to the charter in particular. She has of course raised a great many questions that many of us are going to want to turn over in our minds for some time as we go through this exercise, because I do not think the attempt to distill a response at this point in time is very easy at all.

Certainly the list of concerns that you raised with respect to the present condition of women in Canada and in Ontario is very persuasive, obviously, and we are, I think, in this Legislature, familiar with most of those points, that women do not now have a position of equality in our society. Nothing we do with respect to the charter or the accord would want to see us weakening any thrust to remedy that situation.

I am not myself, I suppose, in the first instance, persuaded that because the inequality still exists, therefore the provisions in the charter or in the accord necessarily are weak. I am still wrestling in my own mind, I guess, as to the status of the "notwithstanding" introduction to section 28 in terms of what it does and does not override. I think it is very important in our interpretation of the relationship between the charter and the accord as to what that term does really mean and what freight it carries in terms of its capacity to bear litigation on women's behalf. So if you have anything more to say on that point, I would appreciate it.

I am struck of course also by the limitation of the charter. I think many people in Canada thought that initially the charter was kind of a holus-bolus thing to handle all kinds of rights situations and then discovered that principally it has to do with the relationship between citizens and government rather than other circumstances that people find themselves in and that there are real limitations there. Whether the accord in some way can go beyond the charter in that respect, I am not quite certain.

The point you make with regard to the Bill 30 case and the charter and the accord is certainly an interesting one when one talks about whether the

Mr. Allen

C-1110-2

~~27~~ February 3, 1988

charter overrides the 1867 provisions in section 93 or not, in some of its provisions.

Certainly the charter itself, in section 29, reaffirms 1867 and section 93 by affirming that nothing in the charter derogates from rights accorded under the "denominational schools" provision by and under the Constitution. Therefore, any setting of the charter in total against the provisions of section 93 in 1867 is at the beginning a nonstarting argument as far as I can see, unless one of course is going to challenge both the moral propriety of section 93 on the one hand and the moral propriety of section 29 on the other, in which case you have a different kind of argument going.

So I am not myself at all sure that I personally put a lot of weight in the argument that you cite. If you could respond to that, I would appreciate that.

I would have to be persuaded on somewhat more substantial grounds, I think, that the Quebec round became a men's round, denying women's rights.

C-1115 follows



~~...kind of argument going so that I am not myself at all sure that I personally put a lot of weight in the argument that you cite. I would appreciate if you could respond to that.~~

~~I think I would have to be persuaded on somewhat more substantial grounds that the Quebec round became a men's round denying women's rights if, in fact, it would appear that the Charter of Rights and Freedoms, under section 28 with the "notwithstanding", in fact can carry the burden of maintaining women's rights. Maybe you would like to respond to two or three of those comments because I am really quite puzzled about the interplay of all those things. But that is some initial response that might help you, and it might help me to hear your response to that too.~~

Ms. Baines: I would like to try to respond to these puzzling questions, and perhaps you could help me if I do not cover everything that you have mentioned. First of all, you raised the question of the interpretation on the "notwithstanding" clause in section 28. I looked at all of the cases across Canada that have been reported as having any information whatsoever about section 28 between the time that section 28 came into effect, which was April 1982, and last September.

I have not updated my research, but as of last September, there were 21 judicial decisions that made reference to section 28. Looking at each one of those decisions, I discovered, for example, that three of those 21 had absolutely nothing to do with sex equality whatsoever. I am sorry, I could not find it anywhere in any one of those three decisions. Another nine or 10 of those decisions simply quoted section 28 with no commentary and no elaboration on its meaning.

Mr. Allen: How did they apply it? To what ??effect?

Ms. Baines: They did not apply it.

Mr. Allen: They did not apply it.

Ms. Baines: They simply, if you will pardon the expression, tossed it into their judgement at some point. The other eight or nine decisions that had more than a sentence--and not many of them had more than a paragraph on the meaning of section 28--had very contradictory information. For example, a provincial Court of Appeal--and it was not Ontario--in a case decided before April 1985 when section 15 came into effect, interpreted section 28 as not having any effect until after section 15 would come into effect. That is before section 15 came into effect.

Another provincial Court of Appeal in another province--I think it was British Columbia and the first one was Nova Scotia--in a case decided after April 1985 after section 15 had come into account, said that it could not use section 28 to make a decision because section 28 was only effective before April 1985. Catch-22: two provincial courts going in completely different directions. I had some problems when I read those two decisions. On the question--

Mr. Allen: Section 28 was of no effect because section 15 had come into play, in other words.

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Ms. Baines: It was only intended to have effect before section 15 came into play.

Mr. Allen: Because presumably section 15 incorporated the intent and meaning of section 28?

Ms. Baines: The court did not elaborate.

Mr. Allen: It did not say.

Ms. Baines: The court did not elaborate on this. I assume that it was trying to suggest that sex equality was covered both before and after April 1985. The net result was it was not covered in either decision because, of course, you did not have the proper coverage that was necessary. I am one of the people who thinks that if you have a separate section in the charter, it must have a meaning. I have said that about section 16 of the accord; I say that about section 28. I do not think it is redundant. I think it must have a distinctive meaning from section 15. Like many other people, I am working at what that meaning might be as reported in a judicial decision.

Let me go on. With respect to the "notwithstanding" clause, there have been two lower court decisions attempting to give the meaning of the "notwithstanding" clause in section 28. One, the Ontario Trial Court in the Blainey case stated categorically--fortunately it was only the trial court--that the "notwithstanding" clause in section 28 could not possibly mean that section 28 overrode section 1 of the charter.

The other--and I am sorry, I cannot remember which court it was--said to the contrary that, as Professor Hogg said to you yesterday, there is a strong possibility that the "notwithstanding" clause in section 28 may have an impact on section 1 of the charter. That court--it was not a higher court--said that it was. So we do not know. I know what the intention of the women who created section 28 was. I was part of them and I know that the intention of the creation of ~~section 28 is~~

C-1120 follows.

98
(Ms. Baines)

~~I cannot remember which court it was--said to the contrary that, as Professor Hogg said to you yesterday, there is a strong possibility that the "notwithstanding" clause in section 28 may have an impact on section 1 of the Charter of Rights and Freedoms. That court--it was not a higher court--said that it was. So we do not know. I know what the intention of the women who created section 28 was. I was part of them and I know that the intention of the creation of section 28 in April 1981 was that it should speak to the section 1 limitations clause in a very strong voice.~~

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There is only one provincial Court of Appeal decision. It is the Nova Scotia Court of Appeal, in the reference with respect to family benefits, that has said categorically and in several pages--the only decision that spends several pages on the meaning of section 28--that section 28 should be given the strongest possible interpretation. But that decision has yet to be applied across Canada and we do not know if that would happen.

??In response to your first question with respect to the meaning of the "notwithstanding" clause in section 28, I have a hope. I know the purpose of the clause, I know why it was created. I know that it was created six months before, for example, the override clause, which some people sometimes think that section 28 was directed at. Section 28 was invented and created long before the override clause was even a gleam in anyone's eyes. If that "notwithstanding" clause in section 28 has any meaning whatsoever, it has to be with respect to section 1 of the charter. However, we need a Supreme Court of Canada decision to that effect.

If I can combine that first question that you asked with your last question about whether we should characterize the accord negotiations, which began as the Quebec round, now as the men's round--and you related that question to the question of whether section 28 could carry the burden--my answer is quite simply it does not look like it, given section 16 of the accord. Absent the accord, I would have put my money, my words and every single piece of legal advice I could offer on section 28 carrying the burden. Absent section 16 of the accord, I would have done the same thing.

But, unfortunately, given section 16 of the accord, given the specific reference to sections 25, 27, 35 and subsection 91(24) of the various Constitution acts--they are very specifically referred to by section number--I would suggest to you that any reading of section 16 by the court will be a reading that says: "What you see is what you get. You do not see section 28, you do not get section 28." It cannot carry the burden that it was intended, that you have suggested it was intended, and that Professor Hogg suggested that it was intended to do.

I do not know if that resolves your puzzle on those two questions.

Mr. Allen: But I think that you--

Mr. Chairman: Excuse me, Mr. Allen.

Mr. Allen: Okay.

Mr. Chairman: I apologize, but I do have some other questioners, I

am mindful of the time and also that Professor Lederman is here and also that we are going to have questions that I am sure in the future we may wish to put back to Professor Baines. I would like to ensure a couple of other questioners here--Mr. Harris, Mr. Breaugh and Miss Roberts--and then I think, if we could, we will wind up this round and proceed.

Ms. Baines: Could I make one brief reference to the question that was raised with respect to the Bill 30 case and section 29 of the charter?

Mr. Chairman: Sorry, yes.

Ms. Baines: I should note that if you have read the three judgements in the Bill 30 case, you would see that all three of the judges make a reference to section 29 of the charter and then proceed to say that they are not resting their decision on that section. So I am sorry, it does not carry the basis of that decision whatsoever. They made their decisions as if section 29 did not exist, and they have said so.

Mr. Harris: There are two things that I wanted to ask. Section 29 you have answered. I think you have answered the other, that in the absence of section 16 in the Meech Lake accord you would have no difficulty.

Ms. Baines: Yes. Please do not hear that as suggesting that you should recommend that section 16 be taken out. I am not making that recommendation.

Mr. Harris: No, I understand. But had section 16 not been in there, you would have had no difficulty.

Ms. Baines: Had section 16 not been in there, we would have been litigating our hearts out, but we would have felt that we were not placed at any risk and that there was no hierarchy of rights that was causing us problems.

Mr. Harris: So that it would be your position section 16 should be there with what you want in section 16 as well. In other words, section 28.

Ms. Baines: I have suggested that is the starting point. I have also said that my research into the section 28 cases, and more particularly the Ontario Court of Appeal decision in Lucas and Neely, says that section 28 cannot be read alone. It must be read with other sections of the charter, and that has led me to conclude that the whole charter should be in the accord.

Mr. Harris: So you would prefer that to the omission of section 16 altogether.

Ms. Baines: Absolutely.

~~Mr. Harris: Do you have~~

C-1125 follows.

~~Ms. Baines: I was suggested that is the starting. I have also said that my research into the section 28 cases, and more particularly the Ontario Court of Appeal decision in Lucas and Neely, says that section 28 cannot be read alone, it must read with other sections of the charter. That has led me to conclude that the whole charter should be in the accord.~~

~~Mr. Harris: So you would prefer that, to the omission of 16 altogether?~~

~~Ms. Baines: Absolutely.~~

Mr. Harris: So you feel that those who pressed for 16 were wise to press for 16--multicultural groups and presumably native groups? They needed 16 in Meech to give full effect to what they wanted to achieve out of the charter and out the ?? 1982.

Ms. Baines: I think the position that I would say is that the wisdom now is for women's groups to say that they are analogous to those groups, and in so far as those groups have protection, as best we can tell because of their collective rights and their cultural aspect--according to the federal minister--then the same argument is being made on behalf of women.

Mr. Harris: I understand your expertise has been on women, but would you say that they were well advised to press for section 16 to be included in Meech?

Ms. Baines: If you are asking me if I would advise them to press for that, I, with hindsight, cannot see now how they would want to press for it.

Mr. Breaugh: You may be aware that we have a few little political problems about putting amendments, but one of things that you have suggested may resolve some of our problems, and that is to do a reference. Could you give us a little bit about what it would look like and would you subsequently be prepared to do that in some more detail?

Ms. Baines: I would certainly be prepared to do that in some more detail. It is dangerous to say something off the top of my head, but what I would like to suggest is that if you were to look at the constitutional reference case in 1981, I think you could actually borrow some of the language that was used in that particular reference from the three different provinces in order to make the reference in this context. I think it would be perfectly feasible. I think you might also find, as I say, that at least one other province is considering this possibility.

Mr. Breaugh: We are having a problem of the Premier (Mr. Peterson) saying, "No amendments will be tolerated, you fools," so to spend a great deal of time and effort putting forward amendments--since most of us can count--is not going to do us a whole lot of good. We are groping about for other more positive things that might not cause people all kinds of embarrassment and actually might do somebody some good.

If you would, I certainly for one would appreciate some thought to what the reference would look like and how we might put that together perhaps with others who have other concerns. We have used this technique before, with some measure of success. At least, it does alleviate some concerns for some people, so I would certainly appreciate it if you would take a little time and do that.

Ms. Baines: You have my services on that.

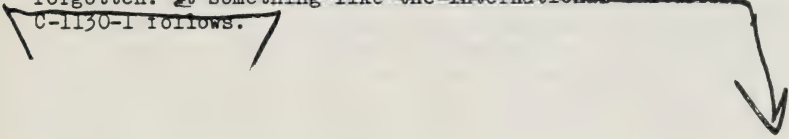
Mr. Breaugh: Free services from a lawyer.

Mr. Chairman: If I might just make a comment, Mr. Breaugh, I think it is useful that you raised the point. I have stated very clearly that this committee is going to listen to the testimony that is given before it and this committee, in due course, will consider the recommendations that it wishes to make. As Mr. Breaugh says, there are some other things floating around, but in terms of what this committee will do, that will be up to this committee. I think it is quite appropriate that we consider options such as the one that you have mentioned.

Miss Roberts: I will be as brief as I possibly can, Mr. Chairman. Thank you very much, Professor Baines. It was very excellent, and I enjoyed the way you took us through the argument.

One thing I would like to ask you, and that is with respect to section 27 of the charter. It indicates ?? "multicultural heritage of Canada," and your argument was that there is a culture--a woman's culture. Could it not be argued that we are caught within that multicultural heritage? Is that not a possibility and therefore women's culture, or whatever you would like to call it, falls within 27 as well, therefore within section 16 of the accord?

Ms. Baines: I think that argument could be made; I do not subscribe to it. I think that when you talk to women from cross-cultural groups, you will find commonalities. I think, indeed, that is what sociologist Jessie Bernard is writing in her most recent book, the title of which I have forgotten. ~~It something like the international culture~~
C-1130-1 follows.



~~women's culture, or whatever you would like to call it, falls within 27 as well, therefore within section 16 of the accord?~~

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~~Ms. Baines: I think that argument could be made. I do not subscribe to it. I think that when you talk to women from across cultural groups, you find commonalities. I think indeed that is what sociologist Jessie Bernard is writing in her most recent book, the title of which I have forgotten. It is something like "the international cultures of women." You will find that women's culture cuts cross-culturally and we have indeed a shared experience as women that constitutes a culture. We are just exploring that at the moment. We do not know the dimensions of it. I would be hard pressed to describe it to you. I would certainly suggest Jessie Bernard's book as a starting point.~~

Miss Roberts: So it is something that is not definite enough in your own mind that you can use as a legal argument to put forward in front of a court.

Ms. Baines: In front of a court? If you offered me the challenge, I would do it.

Mr. Chairman: Professor Baines, I want to thank you again very much for the paper in which you have presented to us a number of the avenues. I think, as Mr. Allen said, you have put before us a number of things that we are going to have to consider, reflect upon, think about and relate not only as we go through the hearings but also as we are considering our report. I think it is fair to say that we may very much want to talk to you again about some of those points, and we will certainly keep in touch in exploring some of those matters that perhaps we have not had an opportunity to raise at this point or which arise later in our own discussions. Again, I want to thank you very much for coming down from Kingston and being here with us this morning.

Ms. Baines: Thank you, Mr. Chairman. I would welcome any future conversations.

Mr. Chairman: We will now move to our second witness, Professor Lederman. I apologize for the fact that we are somewhat behind time, but I can assure you, sir, that we will make sure that we cover as fully as we need to the presentation that you will be making and offering our questions.

The clerk is giving out to the members a copy of your constitutional article that appeared in the Financial Post, which I believe Professor Baines also made mention of. Perhaps, Professor Lederman, we could ask you to summarize the main points of that argument. That would enable us to put some questions to you which would further amplify your comments. Please feel free to add anything else that you would like to do at this time.

I might just add for the members of the committee that Professor Lederman was a member of the Ontario Advisory Committee on Confederation, which former Premier John Roberts set up in 1965. He was very much involved in the process for the Ontario Confederation of Tomorrow Conference and the first

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(Mr. Chairman)

C-1130-2

35

February 3, 1987

round of constitutional discussions which took place from 1968 through 1971, so he is certainly no stranger to these issues.


It is a pleasure for us to have you with us this morning. I will turn the microphone over to you.

DR. W. R. LEDERMAN

Dr. Lederman: Thank you for your welcome, Mr. Chairman. It is an honour to be invited to appear before this committee. After 30 years, I count myself a citizen of Ontario as well as a citizen of Canada. I am very much concerned that Ontario should continue to play the leadership role it has always played in constitutional issues in Canada.

I have about 15 minutes of opening remarks I would like to make and then I will be open to questions.

C-1135-1 follows.



~~...very much concerned that Ontario should continue to play the leadership role it has always played in constitutional issues in Canada.~~

~~I had about 15 minutes of opening remarks I would like to make and then I will be open to questions.~~ I do not have the opening remarks in a text I can distribute, but I would like to make them first and then respond to questions. The document that has been circulated to you is what I have published on December 31 in the Financial Post. That is the article which my respected colleague and friend from Queen's, Beverley Baines, responded to one week later. I think she has, in effect, given you her arguments, the arguments she published in the Financial Post for the position. She has given that to you in her presentation this morning.

First let me say unequivocally that I regard the agreement on the constitutional accord, Meech Lake, and the draft of amendments to implement it, Langevin, as a very fine political achievement in the highest sense, in the best sense of the word "political." Successful drafting of basic constitutional provisions like these is a very demanding enterprise. Such constitutional provisions have to be brief and in general terms. One wants 10 pages, not 10,000.

Just as a matter of the capacity of language alone, doing this is difficult in either English or French, though these are two of the greatest languages of world civilization. There are limits to the capacity of words to convey meanings with certainty and to project those meanings to control future events. Words are imperfect vehicles of meaning, but they are all we have. We have to do the best we can.

In addition to these linguistic difficulties for constitutional drafting, there has to be a high degree of political consent to the formulas of words used. Nevertheless, the 11 first minister and their advisers have met the linguistic and political challenges, I think, very well. The Langevin draft is not perfect, but perfection is simply not attainable in these matters in any event.

You may think I am labouring the obvious on these drafting points, but, with respect, I do not think I am. What I have called elsewhere the documentary fallacy about laws, especially constitutional laws, goes like this.

If somehow you can just get the right combination of words down on a piece of paper, societal problems can all be completely solved. In other words, whatever is wrong with constitutional provisions is caused by bad drafting and can be fixed, completely, by good drafting.

Much of the adverse criticism of the Meech Lake accord and the Langevin draft is, to some extent at least, based on this fallacy. I say again, these documents are not perfect, but they do about as well as can be done. Critics who would redraft these constitutional provisions would, I believe, quite possibly cause more problems than they would thereby solve.

What is the usefulness of constitutions and how do they enable us to face the future and to maintain a peaceful, viable society?

It is characteristic of constitutions that they are mainly devoted to setting up institutions and laying down processes whereby ordinary laws are...

C-1140-1 follows

37 February 3, 1988

(Dr. Lederman)

1140

~~What is the usefulness of constitutions and how do they enable us to
shape the future and to maintain a peaceful, viable society?~~

~~It is characteristic of constitutions that they are mainly devoted to
setting up institutions and laying down processes whereby ordinary laws are
regularly made in great volume, detail and variety as they are needed in the
future when new societal problems not now foreseeable arise and demand
attention. When I say ordinary laws, I mean statutes of Legislature like the
Legislature of Ontario and the Parliament of Canada.~~

Hence, the main thrust of legal change depends on the continuous functioning of parliamentary bodies to make ordinary statute laws and on the continued functioning of the independent courts to interpret those statutes. These are the traditional functions of legislatures and courts.

In addition, since 1982, the superior court required, by virtue of the Canadian Charter of Rights and Freedoms, a review function with respect to ordinary statutes which is a power to take a second look, in some circumstances, at what the parliamentary bodies have enacted, in order to ensure that their enactment, have observed certain basic, substantive and procedural standards that obtain in our free and democratic society and which are declared in the charter.

The primary initiative is with the parliamentary bodies. What the courts have is a selective power of review of what the parliamentary bodies have done. I can perhaps illustrate this by an analogy to major athletic contests. You can think of players and you can think of referees. It is the parliamentary legislative bodies that field the teams and the strategies in major athletic contests. But for those contests you have to have referees and the judges are the referees, now with some added power of refereeing because of the charter. The judges cannot play the game. They cannot field the teams and plan the strategies, but you cannot have the game without the referees, without the judges. You need the referees too.

The functions are somewhat different and this becomes quite clear when you realize that what the courts have, by way of power to enforce the charter, is a power to strike down legislation which does not meet charter standards, to make that binding and then to strike it down, but they cannot put anything in its place. Only the legislatures can do that.

One thing we need to be very careful about is to remember the importance of the political process, the importance of our democratic representative legislative bodies and that they are the prime reactors in legal chains. I do not disparage for one moment the importance of the judges, the importance of the referees, but they cannot play the game. They can oversee to a certain extent how the game is played.

I want to turn now briefly to the linguistic duality-"distinct society" clause of the Langevin draft because it draws attention to something that has always especially concerned Ontario as well as Quebec, through Canadian history from the 18th century to the present.

C-1145-1 follows

~~I want to turn now briefly to the linguistic duality, "distinct society" clause of the Langevin draft, because it draws attention to something that has always especially concerned Ontario as well as Quebec through Canadian history from the 18th century to the present. The linguistic duality "distinct society" clause is intended to be section 2 of the act of 1867.~~

"The Constitution of Canada shall be interpreted in a manner consistent with (a) the recognition of the existence of French speaking Canadians centred in Quebec, but also present elsewhere in Canada, and English speaking Canadians concentrated outside Quebec but also present in Quebec constitutes a fundamental characteristic of Canada, and the recognition that Quebec constitutes within Canada a distinct society."

Then it speaks of the role of the parliament of Canada and the role of the legislature and government of Quebec. Subsection 4 says:

"Nothing in this section derogates from the powers, rights or privileges of parliament, or the government of Canada, or the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

This states the historical societal facts, I think, clearly and correctly both in terms of the French language and the English language. My point is that throughout this whole historic period, the English speaking leaders of Upper Canada--later called Ontario--had been leaders in national accommodation to the French fact in Canadian life. And Ontario very much has a leadership role to play at the present time.

As long ago as 1848, this was an important feature of the winning of responsible government from the British. In the old United Province of Canada from 1841 to 1867, Ontario and Quebec were one province, the United Province of Canada, from the Gaspé to Windsor. This had been legislated by the British parliament in response to the Durham report.

The Durham report had two principle features. It recommended that responsible government, that is, cabinet government, should be granted to the British North American colonies over all domestic matters, which would mean that the cabinet had to be drawn from the party that controlled the legislature. That was not the situation in 1840.

On the other hand, the Durham report also recommended--and this was just after the Rebellion of 1837--that the problem posed by the French Canadian presence in Quebec should be solved by assimilation of the French Canadians into the anglophone culture and the anglophone group. In the parliament of the United Province of Canada, the only official language to start with was English. The amalgamation of the provinces, Upper and Lower Canada, had taken place without any real consent of the French Canadians of Lower Canada. So it was a low point for the French Canadians in Lower Canada.

~~At this time, Robert Baldwin was the Reform Party leader in Upper Canada and Louis-Joseph Papineau was the leader in the French Canadian--~~

C-1150 follows

~~The amalgamation of the provinces, Upper and Lower Canada, had taken place without any real consent of the French Canadians of Lower Canada. It was a low point for the French Canadians in Lower Canada.~~

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At this time, Robert Baldwin was the Reform Party leader in Upper Canada and Louis La Fontaine was the French Canadian political leader in Lower Canada. Robert Baldwin approached Louis La Fontaine in a secret correspondence--first it was secret and confidential and then it became open, of course--and Baldwin said to La Fontaine, in effect, "Let us work together to accomplish responsible government." The British was dragging its feet and they were not going to grant that part of the Durham recommendation--not right away.

"Let us work together," Baldwin said to La Fontaine, "to advocate and to secure the grant of responsible government. Once we do that, we will control the legislation of the parliament of Canada and we can address the grievances which you and your people feel so deeply."

That is what happened. The Baldwin-La Fontaine alliance did win their point. In 1948, the British government did grant responsible government and very shortly, French was added ??an official language of the parliament of the old Province of Canada.

There you have the Ontario leader and the Quebec leader getting together in the interests of a continuing country but in the interests of justice and accommodation within that context for the distinct society in Lower Canada, the French Canadian. The Baldwin-La Fontaine story is not very well known.

The Confederation story, which is much better known, is the same. George Brown and John A. Macdonald buried the hatchet long enough to make an arrangement for a federal system with Cartier, the effective political leader in French Canada. That is a better known story, so I will not go on, but it illustrates again my point about the important role that Ontario has always played in these deliberations and the progressive and accommodating role Ontario has played. That has continued for us ever since, and particularly since the Second World War. I think that part of it is well known to you.

Premier Peterson's support for the Meech Lake accord is, in my view, very much in the best tradition of Ontario's historic record of leadership. The purpose of the Meech Lake accord in the Langevin draft, the overwhelming purpose of them, is to repair the omissions of 1981-82 when we instituted patriation, new amending processes, and the Charter of Rights without the consent of the government of the province of Quebec.

I am not going to rehearse those events except to say that the federal government and parliament and the other nine provinces did it reluctantly, but they found it was necessary to proceed with nine provinces consenting and the federal parliament. I think it was clearly understood at that time that the--

C-1155 follows



(Dr. Lederman)

~~...I am not going to rehearse those events, except to say that the federal government and parliament and the other nine provinces, I think, did it reluctantly, but they felt it was necessary to proceed with nine provinces consenting and the federal parliament. But I think it was clearly understood at that time that the effort would have to be made to win the willing consent of Quebec to the new constitutional arrangements. Meanwhile, as a form of protest, Quebec has been boycotting federal-provincial processes at the amending process and this is by common consent in Quebec. The unhappiness with the events of 1981 and 1982 was shared by the Liberal opposition of the day in Quebec as well as by the Parti Québécois government.~~

The Quebecers will admit that technically the changes of 1982 are in force in Quebec, and so they are, but it is not good enough to have a merely technical, legal validity of our basic constitutional arrangement in Quebec. That needs remedy. Mr. Mulroney and Mr. Bourassa both campaigned and won elections on the footing that they would seek a remedy, and to make a long story short, they have done so. It is most important that this effort should succeed because the Quebec government put forward requests for changes which would satisfy them and by virtue of which they would signal their willing assent to the arrangements of 1982 as amended to comport with these specific requests which they made. That is what the Meech Lake accord and the Langevin draft are all about.

It if goes through successfully, then we proceed, with our new amending processes and with Quebec collaborating, to deal with other problems which need specially entrenched constitutional changes. The western provinces particularly, and perhaps many other people in the country besides, want to see reform of the Senate in Ottawa, and that requires constitutional amendment. It is inconceivable that it should take place without the consent of Quebec. Aboriginal rights: We have already made some attempts to constitutionalize aboriginal rights but Quebec has been abstaining, but again I doubt whether that can be accomplished without the co-operation of Quebec.

So I think we should keep our eyes on the main thrust of these proposals, which is to restore political legitimacy to the Constitution in Quebec and thereby to facilitate all the changes and developments that may necessitate further constitutional change. Since this contemplates changes in the amending process, under the rules of 1982, which we are now following, this requires unanimous consent of--

C1200 follows

41

February 3, 1988

(Dr. Lederman)

~~...since this contemplates changes in the amending process, under the rules of 1982, which we are now following, this requires unanimous consent of the 10 provinces signified by their respective legislatures and of the Parliament of Canada signified by a resolution from the Parliament of Canada. Now other things of equal importance which we may want to do will likewise require that kind of support, widely distributed consent in the country. So what we have now in the Meech Lake and Langevin proposals is an attempt to work the 1982 amending formula, and if it turns out that we cannot do this, that it breaks down and some of the essential consents go missing, when can we make that amending process work, when would we be able to get unanimity and on what subject?~~

1200

This is what worries the people who say, and I am one of them, that the Meech Lake accord, the Langevin draft, is about as good as it can be right now given the limitations of language and politics, and if special interest groups are allowed to cause amendments to it, then this sort of submission will multiply and the whole deal with unravel. I think this is a very real fear, and there is a very great deal at stake, as I have tried to indicate. I think the Quebec requests are reasonable.

Many of the very experienced people who appeared before the Ottawa committee in August, Gordon ??Robertson, former clerk of the privy council, Jack ??Pickersgill, the grey eminence of the federal Liberal Party, Robert Standfield, these people all said: "Look, this is a very good proposal which has come to us with the approval of a government of Quebec. We should take this opportunity. We should open this window of opportunity and use it. If we do not, then we are going to have to get along without any significant constitutional change."

I honestly do not think the Meech Lake accord is a serious threat of any kind either to the integrity of the distribution of federal and provincial legislative powers, the federal-provincial division of legislative powers which is at the core of the federal system. I do not think it threatens any impairment there and, section 16 or no section 16 of the accord, the Langevin draft, I do not think it threatens in any way the charter rights of any citizens or groups in this country.

The federal committee reached the conclusion that with respect to the charter what many of the groups who were genuinely uneasy--

C1205 follows

(Dr. Lederman)

~~I do not think that it prejudices in any way the Charter of Rights or any citizens or groups in this country.~~

~~The federal committee reached the conclusion that, with respect to the charter, what many of the groups who were genuinely angry, genuinely aggitated about it--~~ I do not deny for one moment the genuine character or the good faith of those who would like to see something changed. I do not question this. The federal committee concluded that what the defending groups were complaining about was primarily the Charter of Rights itself, Meech Lake accord or no Meech Lake accord.

It was a surprise to many people to discover that there are two stages to defining the Charter of Rights. Because of section 1, the rights as set forth in the charter are guaranteed, but subject to reasonable limitations. That makes the final definition of the Charter of Rights a two-step process, and you do not have the Charter of Rights defined until you have taken both steps. Gradually, as the cases come in and the precedents build up, what reasonable exceptions will get through and what reasonable exceptions will not will develop from judicial precedent. These matters are very complex and it is inevitable that we should have to rely on the independent judiciary for these, what you might call, fine-tuning adjustments. It is inevitable that we should and it is going to take some time to build up the precedents that will give the charter meaning.

The point I am trying to make is that as far as a constitutional document can do so, to be specific, the charter protects and honours women's equality rights. Any limitations there are on that are internal to the charter and would not be the result of any section of the Meech Lake accord having an adverse effect on the Charter of Rights. That was the basic conclusion of the federal committee and I agree with it.

Those are my opening remarks. I think at this point, I am prepared to invite your questions and I will do my best to respond as lucidly as I can. I say respond rather than answer, because some of the answers are far in the future.

Mr. Chairman: Thank you very much, Professor Lederman. If I might, in the committee, we forget sometimes that there are cameras around and in identifying you, I neglected to note that you are of course a professor of law at Queen's University, the former dean of law, as well as the other things that I mentioned in terms of the advisory committee, the federation. I would not want to pass without knowing your strong ties to Queen's University.

Mr. Offer: Thank you very much, Professor Lederman, for your thoughts on the matter which we have at hand. I guess

C-1210 follows

February 3, 1988

~~(Mr. Chairman)~~

~~things that I mentioned in terms of the advisory committee and the federation. I would not want to pass without noting your strong ties to Queen's University.~~

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~~Mr. Offer: Thank you very much, Professor Lederman, for your thoughts on the matter which we have at hand.~~

I guess what I want to do is just zero in on a point you have raised, not only this morning but in a copy of the article which you prepared for the Financial Post. It really dealt--and deals with in the main, I would suggest--with the effect of section 16 of the accord.

This morning, we heard from Professor Baines her concerns with respect to section 16. I think it is fair to say that she indicated in her brief that the sections referred to in section 16 did confer rights as opposed to being interpretive provisions. Professor Hogg yesterday indicated that those sections dealing with multicultural groups and aboriginal peoples were merely interpretive.

My question to you is your position with respect to the impact that section 16 would have, as a threat, on women's rights, as has been indicated by Professor Baines this morning.

Dr. Lederman: I think Professor Baines's objections to section 16 relate to what is not in it rather than what is in it. I think what is in it is purely interpretive.

Let me read two of the things that are in it. Section 16 of the ?? draft says, "Nothing in section 2 of the Constitution Act 1867 affects sections 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act 1982 or class 24 of section 91 of the Constitution Act 1867."

Section 25 of the charter says, "The guarantee in this charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including any rights or freedoms that have been recognized through the royal proclamation of 1763 and any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land-claim settlement."

Section 25b was amended by the constitutional amendment proclamation of 1983. This did go through with consent. It now reads, "Any rights or freedoms that now exist"--those are new words--"by way of land-claim agreements or may be so acquired."

Section 27 of the Canadian charter says, "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Now, sections 25 and 27, people like me call them interpretive clauses because it says ...

C-1215 follows

(Dr. Lederman)

~~... 27 of the Canadian charter: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."~~

Now, people like me call sections 25 and 27 interpretative clauses because they say that something else shall not be construed so as to do so and so, or this charter shall be interpreted in a manner consistent with so and so; so we call them interpretative.

Now listen to section 28: "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." That is more than a merely interpretative clause, and so in my mind, that is what puts section 28 in a somewhat different category from sections 25 and 27. It is an interpretative presumption, but much more. It gives, I think, special emphasis to sex equality rights. I am quite happy with that. I am in favour of women's equality rights. I recognize that women have been a disadvantaged group as so far as the male-female dichotomy is concerned. I recognize that, so naturally they are the persons most interested in the equality rights for women, which are among the guarantees of subsection 15(1). I am in favour of that. I am in favour of the progress that has been made, with pay equity legislation and so on, and I am in favour of more of it.

But I do not accept that section 28 is in the same category as sections 25 and 27. Neither is it in the same category with the linguistic duality, "distinct society" clause proposed in the Meech Lake accord, because that is specifically stated to be an interpretative principle. There is a saving clause which I read out earlier to the effect that the legislative powers of the federal Parliament and the provincial legislatures have not been abrogated or derogated from, which stamps it as interpretative. So there is some sense to putting section 2 of the Langevin draft together with sections 25 and 27.

Section 28 is very strongly worded, and I think it does not need any assistance from the Meech Lake accord. I cannot think of stronger words to use, anyway, and it carries right through. It will be there after the Meech Lake accord if the Meech Lake accord is enacted. It is there now and there is nothing in the Meech Lake accord that will derogate from it, as far as I can see.

Now, just to complete the picture, section 16 of the Meech Lake accord mentions section 35 of the Constitution Act, 1982, and class 24 of section 91 of the Constitution Act, 1867. Class 24 of 1867 is "Indians, and lands reserved for the Indians." Section 35 is outside the charter, just as class 24 is. The charter ends at section 34.

C-1220-1 follows

(Dr. Lederman)

~~24 of 1867 is "Indians, and land reserved for Indians." Section 35 is~~
~~outside the charter, just as 24 is. The charter ends at section 34. Section 35~~
is outside the charter and 35 was amended in 1983. Now, ??subsection 35(1) in
the Constitutional Act, 1982 said, "The existing aboriginal and treaty rights
of the aboriginal peoples of Canada are hereby recognized and affirmed." That
is pretty substantive. It is not just interpretative. ??Subsection 35(2), "In
this act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis
peoples of Canada." That is as far as section 35 went in 1982.

1220

But again, in 1983, at the ??Conference on Aboriginal Rights, they did
manage to get agreement on these changes. There is now a ??subsection 35(3),
"For greater certainty, in subsection (1) 'treaty rights' includes rights that
now exist by way of land claims agreements or may be so acquired." That is new
in 1983 and the fourth one, "Notwithstanding any other provisions of this act,
the aboriginal and treaty rights referred to in subsection (1) are guaranteed
equally to male and female persons."

If, in relation to aboriginal rights, section 28 needed any more help,
it has got it. It is the specially entrenched Constitution now. Some of the
special arrangements for aboriginal peoples will be prima facie in breach of
??omissions on racial discrimination. You are taking a racial group and doing
something special about them. On the face of it, they may be in breach of
that.

That is what section 25 is about, "The guarantee in this charter of
certain rights and freedoms shall not be construed so as to abrogate or
derogate from any aboriginal treaty or other rights or freedoms..." The
substantive clause conferring aboriginal rights is section 35 in the
Constitution Act, not in the charter, but it reiterates the injunction of
section 28, which says, "Notwithstanding anything in this charter..." So
section 28 does not reach to section 35. It has been made to reach and I think
that point is worth making.

I do not know whether I have been able to answer you, sir.

Mr. Offer: It seems from what you have been saying that, with
respect to section 16 ??of the Meech Lake accord--primarily the sections 25
and 27, as contained in section 16, they are, in your view, clearly
interpretive sections, as opposed to the rights-giving type of section.

Dr. Lederman: In effect, you are simply repeating what is already in
the charter.

Mr. Offer: And section 28 is something else other than an
interpretive section?

Dr. Lederman: Yes.

Mr. Offer: And as such need not be included in section 16.

Dr. Lederman: Yes. And the substantive provisions, section 91, class
24, is the federal legislative power dating from 1867 over Indians and land...

1225 follows

(Dr. Lederman)

the federal legislative power dating from 1867 over Indians, the land reserved for Indians. That is outside of the charter. That is not caught by section 28. Section 35 is outside the charter. The injunction of section 28 has been inserted. In other words, section 35 says special arrangements for self-government for example for aboriginal groups, yes. But they must not embody discrimination between men and women.

Mr. Chairman: I have Mr. Allen, Mr. Harris, Mr. Morin and Mr. Cordiano and I think perhaps that would complete our questioning.

Mr. Allen: Thank you very much for being with us this morning Professor Lederman. I guess notwithstanding everything you have been through in the last few minutes, the fundamental position that you present essentially, is that section 16 is necessary in the accord because all parts of the Constitution are equally present to all other parts and provide a context for the interpretation of every single part of it and must therefore be applied in every case of litigation.

As I understand it, that does sit very much over against what Professor Baines put before us, using the judgement on Bill 30, which was there had in the certain section of the Constitution been some assertion of the independence of that section with respect to the charter and therefore the charter did not impact essentially upon section 93.

You yourself in your article refer to the uniqueness of section 93 with respect to the constitutional settlement of 1867. By the same token, Professor Baines refers to the uniqueness I suppose of the circumstances of the present, whereby the 1982 agreement is unique to another compromise that is necessary apparently to bring Quebec fully into the constitution.

I am wondering how we in this committee are supposed to handle what appears to be some contradiction in your own position regarding the equal presence of the full context that the Constitution provides at all points to all other points and yet the exclusion of some part of the Constitution for certain specific judgements, vis-à-vis some aspects of common life together, such as denominational schools.

Dr. Lederman: We are talking now about the collision of constitutional provisions of equal status, especially in French, constitutional provisions, not ordinary statute law, which are inconsistent, one with the other. Under those circumstances a choice has to be made. The courts make the choice and I go on in my Financial Post argument to indicate how it is done. I point out another thing in the Financial Post article that I was disappointed with again, speaking of the judgement of Madam Justice Wilson. Section 29 of the charter itself is rather explicit and my impression is and Madam Justice Wilson had it in mind. It says nothing in this charter abrogates or delegates from any other rights or privileges guaranteed by or under the Constitution of Canada in respect of the nomination of separate or denominational schools.

What we are involved with there is holding at arm's length the charter provision against religious discrimination because that is what is involved in separate denominational schools. That is part of the warp and woof of Confederation 1867 which was one of the original Confederation bargains.

What I said about section 93 was to the effect that section 93 is unique

(Dr. Lederman)

to the effect that section 93 is unique because it grants the legislator power over education to the provinces and then proceeds to limit that power in favour of certain denominational schools ?? in lower Canada and well Quebec and Roman Catholics in upper Canada Ontario.

1230

It especially entrenches that right to denominational schools which means it especially entrenches the right to that particular item of discrimination. So one could not complain then and one cannot complain now if the Roman Catholic School system insists on hiring Roman Catholic believers in good standing with the church.

But, one thing and I am not saying that every employee and every teacher of every subject they have to hire a Roman Catholic, but in certain sensitive areas they can certainly insist on it and they do. I am not trying to get into all the detail of that, I am just trying to make the point that if either of the public school boards or separate school boards were to make regulations that they would hire only men or that they would hire only women, that would be struck down, not protected by section 93, which is the religious character of the separate school organization and fair funding for the organization. Those are the two things that are protected. I make that point in my article in the Financial Post.

Another point I make is that in the great Patriation Case of September 1981, nine judges sitting. It was six to three against the federal government in favour of the proposition that the substantial consent of the provinces was necessary as a strong constitutional convention. Three judges descended. It was seven to two on the legal issue, different combinations. But all nine judges agreed on one thing. They agreed on the fact that they should take jurisdiction and they should pass on the allegation from the dissenting provinces and the allegations of the federal Parliament because the proposed charter, it was just proposed at that time, would diminish selectively and only partially, but would diminish the legislative powers granted in 1867, mostly the federal Parliament and the provincial legislatures, so they said, "we must look at this."

In other words, they said, "once the charter goes in, legislative powers are going to be diminished when the charter is applicable." That is why there are vital issues for every part of the country in this matter and why we the Supreme Court affirm our jurisdiction to pass on this. It is not just a matter that concerns the federal Parliament or one of the provincial ??

So, they certainly held there that if the charter was put in the normal rule would be that the legislative powers in 91 and 92 of 1867, would not be charter proof.

Now with respect, my colleague, Professor Baines is suggesting I think, because of something which Madam Justice Wilson said, that she is suggesting that generally those powers are charter-proof. Now if they were charter-proof then the charter---

C-1235-1 follows

(Dr. Lederman)

~~With respect, my colleague Professor Baines is suggesting, I think because of something that Madam Justice Bertha Wilson said, that generally those powers are charter proof. If they were charter proof, the charter means very little. In the face of the patriation case, where nine Supreme Court judges—Madam Justice Wilson was not on the court at that time, I do not think—I do not think she had any intention, nor did any of the other judges have any intention to contradict the finding of 1981.~~

The other point about section 93 of the 1867 legislation is that it has a complete remedial scheme within itself. It grants legislative power to the provinces over education. It limits that power in favour of guarantees for certain religious groups, and there are five or six religious groups guaranteed in Newfoundland in the terms they have given it.

Then it provides a special procedure, which is the procedure to be followed if the specially protected rights guaranteed are breached. It involves a petition to the Governor General, a remedial order from the federal cabinet, and if that is disobeyed, remedial legislation is possible. In other words, there is a complete package there and I think that is one thing which Madam Justice Wilson is making clear. The denominational school rights are unique because the remedies to be used are right in there and you have a complete package.

The attempt at a remedial order and remedial legislation was done in 1896. It was attempted. The life of Parliament expired before the remedial legislation could get through. It was defeated, and then the party opposing it won the next election, which was, strangely enough, the Liberal Party under Sir Wilfrid Laurier.

I think Madam Justice Wilson should be read in that limited way, that she was treating denominational school rights as unique.

I think 91.24, Indians and lands reserved for Indians, would be read as applicable to all the aboriginal peoples now. There is legislative power in the federal government. I think the point the justices are making about 91.24 is that there is almost no way that 91.24 could be used without being racially discriminatory. What it contemplates is special legislation for the Indian people. That sets that group apart. But again, that is a limited problem and a special problem and is now modified by section 35, which I read before.

Everything within 16 can be accounted for either on the grounds that it is interpretive or on these other grounds, so I continue to hold the view that...

1240-1 follows

~~grounds that it is interpretative or on these other grounds, so I~~
~~continue to hold the view that 16 need not be there because 35 could stand on~~
its own feet, as far as aboriginal rights are concerned, and the charter can
stand on its own feet. You only need to say 25 and 27 of the charter once, and
you only need to say 28 of the charter once and you have said it in the
charter.

1240

Mr. Chairman: I am conscious of the time. I wonder if I could go to
Mr. Morin and perhaps we will close it off. Undoubtedly, there will be
questions arising as we go through all of this. If we can, as I said to
Professor Baines and Professor Lederman, we may wish to pose some other
questions to you as we move along.

Dr. Lederman: This will be at a later time. I should warn you, I
will be in New Zealand from March 1 to April 15.

Mr. Chairman: We would be delighted. to come.

Mr. Morin: Some feel the "distinct society" clause is going to grant
special legislative power to Quebec, for instance to pass a law promoting its
own distinctiveness. Do you believe that this section is a grant of
legislative power? Also, what effect would it have on Franco-Ontarians? What
effect would it have, for instance, on English Quebecers.

Dr. Lederman: I am getting mixed up in my books of reference. I
think the "distinct society" clause is to the effect that the presumption in
favour of a distinct society in Quebec is a presumption of interpretation. It
will be used as an aid to interpretation in ??pursuing the distribution of
legislative power, but it does not amend the distribution of legislative
powers, it does not change it. Nothing in this section derogates from the
powers, rights or privileges of Parliament or the government of Canada or the
Legislatures, governments of provinces ??due to any powers, rights or
privileges relating to language. So that it is interpretative. Section 2
throughout is carefully balanced. Its linguistic duality, distinct society,
and it recognizes the English-speaking Canadians in Quebec and the
French-speaking Canadians outside of Quebec. The largest group of them outside
of Quebec is in Ontario. The largest percentage of provincial population
outside of Quebec is in New Brunswick where the Acadians represent about 40
per cent of the population. The way section 2 is expressed it carefully
balances these two things.

The "distinct society" point has always been part of the consciousness
of the courts, something which they have taken judicial notice. It is not new,
it is an historical fact, as I said in my opening remarks. The courts have
always been conscious that realistic interpretation has to take account of
sociological linguistic ethnic fact. ~~I think all~~

1245-1 follows

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(Dr. Lederman)

I think all that the "distinct society" clause does is to make explicit that which has been implicit in the past as far as the courts are concerned. Since it has for them been implicit, though it has not been stated anywhere in a constitutional document, they have nevertheless applied it as a presumption of interpretation.

If you want to see an example of that, look at the judgement of Chief Justice Deschênes, as he then was, in the Protestant school board case judgement in September 1982. The judge made the courts and the lawyers work all summer because he said, "The parents have to know by fall and we have to get this settled."

This was an interpretation of article 23 and minority-language education rights in Quebec. Chief Justice Deschênes entertained section 1 arguments, namely that the Quebec clause or Bill 101, which was more restrictive than the Canada clause in article 23 of the charter, about which parents could send their children to the English-speaking schools, he entertained the argument that Bill 101 was a reasonable limitation on article 23 of the charter.

He entertained arguments from counsel for the Quebec government on what the effect would be on the prevalence and the integrity of the French language, what the population of the schools would be at the turn of the century if you followed one clause and what the population of the two school systems would be at the turn of the century if you followed the other clause, the Quebec clause-Canada clause.

He came to the conclusion that there would not be enough difference in impact on the French language and French culture, that the government of Quebec had not been able to prove its case, the case that alleged that the integrity and security of the French language and culture would be impaired. There just was not evidence of that. That was a "distinct society" argument. He weighed it and rejected it.

Your next question to me naturally is, "If section 2 is simply making explicit that which has been implicit, why all the fuss about it, and why indeed should the Quebec government attach some importance to it?"

I think the Quebec government wants to be assured that it can raise that type of argument in a section 1 argument under the charter. I have no inside sources of information, but I can see this advantage to them. They feel more secure looking into the future if that which has been implicit is made explicit, but just as a presumption of interpretation. They are not asking for it to be pushed any further than that. They have agreed to it just as a principal of interpretation.

In other charter issues, if there is a "distinct society" problem, the "distinct society" feature of sociological fact and societal values will take its place in a section 1 argument...

C-1250 follows

1250

~~In other charter issues, if there is a "distinct society" problem, the "distinct society" feature of sociological fact and societal values will take its place in a factual argument, but it will compete with all the other things that can be brought in there as well.~~

I think the Quebec government values having this said explicitly for symbolic purposes and for the practical purpose that it legitimates counsel for the Quebec government arguing on the validity of Quebec legislation, arguing for Quebec legislation being ??

Section 2 also contains presumptions about the linguistic duality of all the provinces as far as French and English are concerned, the proposed section 2. So I think this is a reasonable request in the Quebec proposal.

Mr. Chairman: I want to thank you for coming and spending this time with us. Particularly, we appreciate what I would call the historical judicial perspective which you have placed on a number of these issues and the points you have raised about the judicial process and the legislative process, which is I think one that we want to consider or put in with the various other views that are being brought forward. Your specific reference to a number of issues is most helpful.

I do not know whether the committee, in its wisdom, will decide to follow you to New Zealand, but we certainly wish you well. We are very grateful that you came here today and shared some of your thoughts with us. If there are some other queries, we will try to make sure we do that before you depart for the south seas.

Dr. Lederman: I am very grateful for the courteous and helpful reception the committee has given me, which is not to say that I have necessarily persuaded you. I know you have not had a chance to read this yet, but perhaps if you can read it in a brief form, it does state my main position.

Mr. Chairman: The committee will reconvene today at 2:15 p.m. The committee stands adjourned.

The committee recessed at 12:54 p.m.

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(Printed as C-2)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, FEBRUARY 3, 1988

Afternoon Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Witness:

Individual Presentation:

Beaudoin, Gerald-A., Professor of Constitutional Law, Law School, Civil Law
Section and Director, Human Rights Centre, University of Ottawa

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, February 3, 1988

The committee resumed at 2:24 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: The chair sees a quorum. We will begin our afternoon session.

C'est un grand plaisir, professeur Beaudoin, de vous accueillir ici à Queen's Park cet après-midi. Le professeur Beaudoin est directeur du Centre des droits de la personne de l'Université d'Ottawa. Il est, lui aussi, spécialiste dans le domaine du droit constitutionnel et il a préparé un texte pour nous cet après-midi. Alors, sans plus tarder, je vais vous passer la parole. Nous pouvons commencer.

GERALD-A. BEAUDOIN

Me Beaudoin: Merci, Monsieur le Président, mesdames et messieurs du comité. C'est un grand honneur que d'être invité à comparaître devant vous pour un sujet de la plus haute importance, non seulement pour la province de l'Ontario mais pour le Canada tout entier. Je suis sensible à l'honneur que l'on me fait de m'inviter ici. J'enseigne le droit constitutionnel à l'Université d'Ottawa et je suis en même temps un juriste du Québec, et je pense que ces accords Meech et Langevin sont de la plus haute...

C-1425 follows



~~... de la province de l'Ontario mais pour le Canada tout entier. En ce sens, sensible à l'honneur que l'on me fait de m'inviter ici, d'enseigner devant la Constitutionnel à l'Université d'Ottawa et je suis en même temps un juriste à Québec, et je pense que ces accords Meech et Langevin sont de la plus haute importance pour l'avenir du Canada.~~

J'ai apporté un texte en français et en anglais également. Alors, j'ai fait distribuer le texte en anglais et ceux qui veulent en avoir une copie en français sont également les bienvenus. J'avais l'intention de parler assez rapidement de cet exposé-là pendant 35 ou 40 minutes, et après, de répondre à vos questions--je suis sûr qu'il y en aura--sur les cinq points de l'accord, ainsi que sur d'autres points comme, je ne sais pas, moi, l'article 16, les francophones, les minorités, etc.

Je passe immédiatement à la page 2 de l'exposé et à la formule d'amendement.

Our amending formula now is entrenched in the Constitution since 1982, but it is not a formula of amendment that protects, in my own opinion at least, Quebec in the proper way. In other words, the provinces have the right to opt out, but we cannot opt out of the Supreme Court, the Senate or the House of Commons. So there are some weaknesses in the formula of amendment itself. It is not clear that the civil law system of Quebec is adequately protected in the formula of amendment. Even the existence of the Supreme Court, as Professor Peter Hogg, my colleague, has stated, it is not sure that the Supreme Court itself is protected.

So the Meech Lake accord, in dealing with the entrenchment in the Constitution of the existence of the Supreme Court, the civil law composition of the Supreme Court and the unanimity rule to change those aspects of that Supreme Court is a step in the right direction.

The Meech Lake accord is going to merge sections 41 and 42. It means that the amendment to the Senate and the amendment to the composition of the Supreme Court will require unanimity. It is, of course, more stringent, but it is the only way, in my own opinion, to protect a province like Quebec in the central government, that is, in the Senate and in the central institution.

The criticisms are to the effect that the formula of amendment is becoming much more stringent, but one should not overdo this. It is true that we will now need the unanimity rule for five other subjects that are listed in section 42, but the formula of amendment is still the same, the general one. That is, we need seven provinces representing 50 per cent of the population.

I think the formula is still realistic because extending the unanimity rule to matters as fundamental as proportional representation in the House of Commons, the joining of territories to existing provinces and the creation of new provinces, in my own opinion, does not make the amending formula a straitjacket.

Since 1927, all prime ministers, starting with Mackenzie King, Louis St. Laurent, Deifenbaker, Pearson, Trudeau, Clark and Mulroney, sought to avoid unanimity as far as possible, but they all accepted that in certain areas we need some ...

1430

~~Since 1927, all prime ministers starting with Mackenzie King, Louis St. Laurent, Diefenbaker, Pearson, Trudeau, Clark and Mulroney sought to amend the Constitution as far as possible, but they all accepted that in certain areas we need some unanimity.~~

So for the moment, this is all I will say on the formula of amendment. I would be pleased to answer any questions later on.

The second point is the Supreme Court of Canada. We all realize more and more, but it is obvious since a few years, that the Supreme Court of Canada is more and more important. The Supreme Court of Canada is playing more and more a role in our social, political, judicial and legal life. The existence of the court is not consecrated. It is not entrenched in the Constitution. It has to be entrenched. This is the case in the United States. The court is entrenched in the constitution, but it is not in Canada.

Nobody objects to the entrenchment of the Supreme Court in the Constitution for two reasons. First, the Supreme Court mediates between the two levels of government in the case of the division of power. Second, as we have seen for two or three years now, the Supreme Court interprets the Canadian bill of rights, which is as you know fundamental.

Our Supreme Court is now supreme since 1949, since the privy council appeals were abolished. Our Supreme Court is owing its existence only to a simple statute. Now the time has come to entrench the existence of that court in the Constitution. It is already the case under section 41 of the Constitution Act of 1982, but it is not too clear-cut, at least according to Peter Hogg, and I agree with Peter Hogg on this point, that we have to entrench that more clearly.

The second point is the civil law composition of the Supreme Court. We now have nine judges and three of them are coming from Quebec. This is provided for in a statute, but we have to say that clearly in the Constitution itself. So the wording of section 41 was not good enough on that point and I think the Meech Lake accord is going, again, in the right direction in enshrining the civilian composition of the Supreme Court.

The independence of the Supreme Court, of course, should also be entrenched in the Constitution.

The most difficult point, of course, is the appointment of the judges on the Supreme Court of Canada. From now on, since 1875, the Prime Minister of Canada, the government of Canada, may unilaterally appoint a jurist to the Supreme Court without consulting any province, without consulting the Senate or the House of Commons. In a federal state, I do not think this is good enough. Several governments, Pearson's, Trudeau's, Clark's and all the others, have all agreed that we should change that system.

Several formulas have been suggested: mandatory consultation of the provinces, ratification by a second chamber like in the United States, an alternate provincial and federal list, and finally, a provincial list and a

Mr. Beaudoin

C-1430-2

4

February 3, 1988

double veto. The Meech Lake accord favours the double veto.

In the United States, it is the President who appoints a judge, but under the constitution of the United States, as we all know, the choice shall be ratified by the Senate. It is not automatic, as we have seen in the case of Robert Bork. As a matter of fact, I think 27 nominees of the President of the United States have been rejected by the American Senate ...

C-1435 follows



In the United States, it is the President who appoints a judge, but under the Constitution of the United States, as we all know, the choice shall be ratified by the Senate. It is not automatic, as we have seen in the case of Robert Bork. As a matter of fact, I think that 27 nominees of the President of the United States have been rejected by the American Senate--27 out of 135. But the system works. Sometimes there may be a stalemate, for example, this year, but this is very rare. But it works.

As a matter of fact, Bork was rejected, Ginsberg resigned, and Kennedy was unanimously adopted by the judicial committee of the Senate and obviously, he will be accepted by the whole Senate when they sit later on.

I said on page 19 of this document that it is hard to forecast how a Supreme Court will act once appointed to the highest court. We have the case of the famous chief justice Earl Warren who was appointed to the US Supreme Court by President Eisenhower. Eisenhower said, "He will be a good judge. He has a strong conservative mind, like me, and he will be a strict constructionist." What happened is exactly the reverse. Warren was a very liberal interpreter of the American Constitution, as we all know. Eisenhower was very surprised at the reaction of Warren once he was on the highest court of the land.

So it is always like that. We cannot foresee in advance exactly where a judge will stand in a very important issue, let us say in the United States, civil rights, or, let us say, in the United States or Canada, abortion, in Canada linguistic rights, and ??and some other subjects which are so difficult and are very important and delicate matters. But obviously since the judgements of the Supreme Court are of paramount importance in some areas, like civil rights, civil liberties and the division of power, it is very important that both orders of government be called upon to have a say in the appointment of the judges.

So now the system that is proposed by Meech Lake is that the lists are prepared by the provinces and the Prime Minister of Canada selects a person from that list. There is no perfect system. I do not know of any system that is perfect.

In 1971, the Victoria formula--judges were appointed by the Prime Minister and with the consultation of the provinces--the participation of the provinces and, in case of deadlock, a college electoral or an arbitration officer was appointed.

Is it better now under the Meech Lake than under the Victoria charter? It is debatable. Now there is no mechanism in case of deadlock to solve the problem. Some people say it is a weakness. Some others say, "Well, it is debatable." Because you see, if you appoint an arbitration college to settle a deadlock, it may mean that the final decision is with the person?? that the arbiter, who is not elected. While under Meech Lake, at least the Prime Minister of Canada and the premier of the province concerned are both elected and they will have to agree one of these days.

What happens if the deadlock continues for a certain time? When the judge is from the common law provinces, I do not see a big difficulty, because there is nothing in the Constitution, there is nothing in the Supreme Court that says that a judge shall come from a province, except in the case of ...

~~It is not a big difficulty, because there is nothing in the Constitution, there is nothing in the Supreme Court that says that a judge shall come from a province, except in the case of Quebec--three judges from Quebec. But the tradition is Ontario has three judges, Quebec has three judges according to the law, the western provinces have two judges by rotation and the Maritimes one. If a province is too tough, the Prime Minister is ??knocked down by any of those traditions and those conventions, if I may say so.~~

1440

So it is up to the advantage of a province to co-operate with the Prime Minister for the appointment, because if there is a fight between two provinces, the Prime Minister may select a man or a woman from another province. So he has a powerful play here.

In the case of Quebec, it is a little more complicated because three judges should come from Quebec. He has no choice, because Quebec has a civil system. But still, I think the Prime Minister has a lot of power because he is the one who in the last analysis should say yes or no. So I think it is acceptable.

The Meech Lake accord is also talking about the existence of the court, the civil composition, the judicial removal and judicial appointment. All of this does not raise any big problem. Whether we give too much power to the judges, I will come back to that very important question later on. It is true that they have to define very important questions like peace, order and government property and civil rights, multicultural heritage and freedom of expression.

Let us say section 7 of the charter, as we saw last week--it is true that they have tremendous power, but this is not new you see. This is the case since we have had federalism in 1867 and the Privy Council in 120 decisions and the Supreme Court in more than 100 decisions have construed our Canadian federalism. On the whole, I think they have done a good job. It is part of our judicial heritage in Canada that the control of the legality of all statute is within the courts and they are the guardians of the Constitution.

Finally I should say here that the method of appointed as provided for now in the Meech Lake accord is reasonable. My impression is that the Supreme Court will stay with nine judges, three of them coming from Quebec, and it will continue to be a court of last resort. If at any time we need, in case of illness or absence, to appoint ad hoc judges, I think I would accept the suggestion of the Canadian Bar Association that we appoint the judge ad hoc from retired judges of the Supreme Court or superior or appellate courts.

The Senate is part of the deal at Meech Lake and Langevin. What is the purpose of the Senate? In any federation the Senate, that is the second chamber, represents the states, or the provinces or, in Germany the lander, or in Switzerland, les cantons. The members of that chamber are elected as in the United States, at first indirectly and since 1913, directly. In the United States they are elected. In Australia they are elected. In some other federations, they are designated or, in some cases, Canada and Great Britain, the members of the second chamber are appointed.

The Fathers of Confederation discussed at length the composition of the

Mr. Beaudoin

C-1440-2

7

February 3, 1988

Senate. Finally, they said, "We will not follow the Americans; we will follow the British in that field, and the senators will be appointed like the Lords in Great Britain are appointed."

Were they right? Were they wrong? The debate has been open for a century. Obviously the House of Lords was conceptualized for a country--

C-1445 follows



(Mr. Beaudoin)

~~Finally, they said, "We will not follow the Americans; we will follow the British in that field, and the senators will be appointed like the Lords in Great Britain and appointed."~~

~~Are they right? Were they wrong? The debate has been open for a century. Obviously the House of Lords was conceptualized for a country that was unitary and not federal. The House of Lords of course was conceptualized for a big power like Great Britain and over many centuries. So it is really British and it fits the needs of Great Britain. But is it good or bad in America--the debate is open on this.~~

Now we see that many reforms have been suggested for the Canadian Senate. It is on the order paper for phase 2 of the Constitution. No radical reform has occurred in Canada for the Senate as has been the case in Great Britain under Lord Asquith, Prime Minister in 1911 and 1947.

We have to remember that the Canadian Senate has the same power as the House of Commons except that the government cannot be defeated in the Senate, because there is no vote of confidence, except that the money bills shall originate in the House of Commons and except that now, for amendment to the Constitution, the Senate has only a suspensive veto.

For example, if the Senate in Ottawa is voting against Meech Lake, it postpones the adoption of Meech Lake for six months. But if the Commons is voting again, it is finished. So it is a suspensive veto.

The fact is that the Senate has rendered and is rendering a very good and loyal service to the Canadian nation. There is no doubt about that. It does not play the role in Canada that the Senate has played in the United States, probably because this senators have not used all their powers because they are not elected. That is one theory.

Over the years, we have in Canada what we call "executive federalism," that is some form of a government, the Prime Minister of Canada and 10 premiers of the provinces.

For years people have studied and flirted with the idea of a Senate based on the German senate. It was a ?? . I remember when I was on the F  pin-Robarts commission, everybody was in favour of the senate along the German lines. It was la mode de ?? , but that is no longer the case now. People are no longer talking about that. People are saying, "If we reform the Senate, we will either say that they will only have a suspensive veto everywhere, or if we reform the Senate, it will probably become elected." But it is a big reform and it would be a wise man who could say when and if this will see the light of the day.

Prime Minister Trudeau suggested in 1978 that half the Senate be appointed by the Prime Minister and half by the provinces. It it was one possible reform.

The Meech Lake accord is proposing this. The senator will be appointed by the Prime Minister and the Privy Council--but in practice it is the Prime Minister--but from provincial lists. That is, that provinces will submit a list. There was one, I think, who was appointed a Senator from Newfoundland recently.

Mr. Beaudoin

C-1445-2

9

February 3, 1988

Would it work? I think so. It is temporary anyway, pending the reform of the Senate. But we never know what is temporary may become permanent for a while. It depends. I think it may work, because the Prime Minister has all the time to appoint senators. The quorum is very low, so he may take all the time required to appoint members of the Senate.

Whether the House of Commons is going to accept the Senate that is going to be elected--this would be a rival at its side. On the other hand, Canadians do not want to Houses that are exactly the same, so we have to find something different for the Senate. But this question--

C-1450 follows



~~... so he may take all the time required to appoint members of the Senate. Whether the House of Commons is going to accept the Senate that is going to be elected--this would be a rival that is at its side-- On the other hand, the Canadians do not want two Houses that are exactly the same, so we have to find something different for the Senate. But that question, of course, will be debated in phase 2.~~

1450

The spending power has been very much discussed at the federal level, the Quebec National Assembly and elsewhere, and it is going to be discussed of course in Ontario and in the other provinces. Our Constitution of 1867 does not say, strictly speaking, anything about the spending power, except that one section of our Constitution, section 118, says that certain sums of money will be paid to the provinces by the federal government. In 1868, when the Nova Scotia government threatened the government of the day--the Sir John A. Macdonald government--to secede from Canada--this was one year after Confederation--Premier Howe of Nova Scotia said that the deal was not respected, and he was talking about seceding from Canada.

The Prime Minister of the time changed the allocations of the sums of money to be distributed to provinces and he asked the law officers of the crown in Great Britain whether it was possible for the central government--the federal government--to pay sums of money to the provinces. The law officers of the crown in London said yes. Of course, they are not a tribunal, but they were the law officers of the crown.

In 1937, the Privy Council, which was the tribunal of last resort, handed down a terse judgement on the spending power. The spending power has been defined as being as follows: the federal government may make payments to individuals, organizations and provincial governments in federal and provincial fields, but the federal authority cannot legislate in the areas of provincial jurisdiction.

In other words, the federal authority may give money to a universities, but since universities are coming under provincial legislation and jurisdiction exclusively, the federal government may give the money but cannot legislate in the field of education. This is how the federal spending power has been defined. In 1937, the Privy Council said that the federal government may make payment, but cannot legislate in exclusive provincial fields.

For over 50 years now, no government in the history of Canada has ever challenged the federal spending power. Even Quebec has not challenged that. This is probably because it is advantageous for the provinces to receive some money. But, of course, Quebec has always said, "We agree with the principle, but we would like to delineate this federal spending power." In other words, Duplessis, Jean Lesage and Daniel Johnson, ?? Robert Bourassa and all those premiers of Quebec have always said: "Well, we agree with the principle of equalization payment--péréquation, as we call it in Quebec--we agree with that..."

C-1455 follows.

~~... this federal spending power. In other words, Duplessis, Jean Lesage and~~
~~Paul Johnson, 22 Robert Bourassa and all those premiers of Quebec have~~
~~always said, well, we agree with the principle of equalization~~
~~payment, as we call it in Quebec--but we do not want the federal~~
authority to intervene in provincial fields.

What they have done at Meech Lake and at Langevin Block is this: the spending power will continue. The spending power is even recognized implicitly. It is even implicitly constitutionalized, but what is set clearly in the Langevin-Meech accord is that the right to opt out of those federal spending power programs is now part of the Constitution. In other words, if the federal authority is spending money--shared-cost money that the provincial and the federal authority contribute--in an exclusive provincial field--for example, education--a province may opt out and receive that money.

I think it is a very good thing because this is exactly what federalism is about. Federalism is a system of government where there is a division of power between a central authority and provincial authorities. But, of course since we have rich provinces and not so rich provinces, we have enshrined in our Constitution the principle of equalization payment in section 36 of the Constitution Act of 1982, which is a very good thing that Canada has made.

But Quebec, for a reason or another--but we have to understand why--says: "Okay, we agree with the equalization payment principle, we agree with section 36 of the Constitution Act of 1982, we are ready to recognize the federal spending power, but if the power is exercised in a purely and exclusively provincial field and if it is a shared-cost program, we want to have the right to opt out, to obtain the money and to spend the money ourselves in that provincial exclusive field."

As I explain at page 28, between 1950 and 1960, this was discussed in Quebec at great length, elsewhere in Canada, of course, and even in Great Britain. For example, Professor Beetz, Gérard La Forest and Gérard LeDain, who are now three judges of the Supreme Court of Canada who may have to rule on this one day, have written on the theory of the spending power. At McGill University Frank Scott, at Université Laval the former Mr. Justice Pigeon and the former Deputy Minister of Justice Elmer Driedger have also written on that subject.

We have two ?? on this: M. Lois St-Laurent, the former Prime Minister, Senator Lamontagne, Pierre Trudeau and Antonio Barrette. They have all written on this very extensively and, of course, today all the constitutional law professors are writing some pages on this very important aspect. But the situation now is this: in Quebec a certain group of jurists say the Meech Lake accord, in the field of the spending power, is acceptable because the right to opt out is only in cases where the spending power is utilized in exclusive provincial fields. So it is normal in a federation...

(Mr. Beaudoin)

~~The Meech Lake accord in the field of the spending power is acceptable because the right to opt out is only in cases where the spending power is utilized in exclusive provincial field. So it is normal in a federal that the provinces be master in their own house, in the field of provincial jurisdiction.~~

1500

Those who oppose in Quebec, most of them, say, "well the price is too high because you recognize implicitly the spending power that now is not yet enshrined in the Constitution." That is what Johnson for example and Pariseau would say. They say, "why do you want to recognize the federal spending power? It is not there. You may challenge it." But now with the Meech Lake accord you accept the spending power.

I am of course of the first theory. I am of the theory that Quebec is right in accepting the federal spending power and the provinces and the federal authority were right at Meech Lake and Langevin Block to say, "okay, we recognize the spending power, but we enshrine in the Constitution the right to opt out when the money is spent in exclusive provincial field."

The other argument that we hear in the other provinces is that the Meech Lake accord in the field of the spending power may balkanize Canada. I think there is one thing here that has to be said very clearly. First at Langevin Block on June 3, one clause was added to the spending power. The clause says clearly that the division of power is not changed by the enshrinement of the spending power. In other words, what we enshrine in the Constitution is the spending power as it exists now in our constitutional jurisprudence, not more, not less.

Some jurists and I was one of them, have suggested the enshrinement of that clause because it is the only way to reconcile at Quebec and the other provinces. Quebec say, "okay, I am ready to recognize the existence of the spending power, providing that you accept the right to opt out. If it is an exclusive provincial field and if your program is compatible with the national program." The other provinces have said, "okay, that is fair enough. You have the right to opt out, but the spending power is recognized as it is now and we may use it."

I do not see how this may balkanize Canada. We constitutionalize what is existing now and what we constitutionalize in addition to that, is the right to opt out, but the provinces had that right to opt out. On the whole, I think that the spending power, with the addition of a clause saying that the division of power between Ottawa and the provinces is not changed, but if it is not changed it does not weaken the central authority. On the whole I think it is acceptable.

I remember a discussion that we had the other day here in Toronto. Many professors of law of Quebec and many professors of law of Ontario and some other provinces had a discussion on this spending power. Most of them finally, but not all of them, I have to be careful, most of them agreed in the final analysis, that this accord on the spending power is acceptable.

~~The linguistic duality and the guarantee are not as Quebec. This is very important, fundamental but~~

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~~and most of them finally, but not all of them, I have to be careful, most of them agreed in the final analysis that this accord on the spending power is acceptable.~~

The linguistic duality and le caractère distinct du Québec. This is very important, fundamental but not too well understood in my opinion. It is obvious that the distinct society concept with the spending power clause, has given rise to the most important debate since June last year.

We have to go back to history here. We have to remember that some people have suggested that we enshrine in the preamble of the Constitution, the connector of the distinct society. Now it is not in the preamble that it is enshrined. It is in section 2 of the accord. It is in section 2 of the British North America Act of 1967.

Again, we have to remember that there is a clause that has been added on June 3. The distinct society and the duality does not change the division of power between Canada and the provinces. This to me is fundamental and should be taken into account. That is the first observation.

The second observation is that both the linguistic duality of Canada and the distinct society of Quebec are part of the same article, the same section of the Constitution and that there is an equilibrium between the two.

The third is that there is a return to the concept of the French speaking Canadians and the English Canadians as we have done in the past and I think this is good. There is here a big difference between Langevin and Meech Lake. The linguistic duality is not a surprise. It is part of the fabric of our own country. In my opinion it is necessary to say that.

This explicit clause gives something to the francophone outside of Quebec. They will appear before you I am told. Probably not as much as they would like to have.

Les francophones hors Québec aimeraient avoir plus de pouvoir dans les accords du lac Meech pour que les provinces puissent promouvoir la dualité linguistique dans toutes les provinces du Canada. Et je comprends ça, je suis le premier à comprendre ça. Est-ce qu'on doit amender les accords du lac Meech pour changer et ajouter certains mots? Je peux comprendre qu'on puisse le proposer, mais je pense que les accords du lac Meech donnent tout de même plus de pouvoir aux francophones en dehors du Québec qu'auparavant, puisqu'on dit que c'est une caractéristique fondamentale du Canada. Or, en droit, une caractéristique fondamentale, c'est très fort. Maintenant, est-ce que c'est assez? Là ils le diront, si c'est assez ou non. Et je reviendrai plus tard sur la question de savoir si on doit prendre le risque à ce stade-ci d'amender les accords du lac Meech.

In Bill C-60 of 1978, we had a clause that was not exactly the same but to a certain extent. We used the expression, the Canadian-French speaking society, centred, but not limited to Quebec. In short, the first part of section 2 is a fundamental characteristic of Canada and is being entrenched in the Constitution.

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1510 follows

(Mr. Beaudoin)

~~of Canada and is being entrenched in the Constitution~~1510

What does the words "distinct society/société distincte" mean? It is debatable. But, for most jurists, and I am one of them, the "distinct society" declaration in section 2 is a rule of interpretation. It is not more; it is not less.

A rule of interpretation in constitutional law is very important, but that rule does not change materially the division of power nor the Charter of Rights, because my thesis is that the Charter of Rights, being part of the Constitution, is paramount. As section 91 and section 92, the division of power, is paramount and the "distinct society" concept is a rule of interpretation. It may, in case of doubt, tip the scales to one side or another if it is in a grey area. It may, to a certain extent, particularly under section 1 of the Charter, orientate the charter, but it does not give to Quebec an additional legislative power. It enshrines in the Constitution a concept saying that Quebec is a "distinct society." But the next paragraph says that this does not change the division of power between Ottawa and the provinces. It means that Quebec has the same legislative and executive power as the other provinces have.

In that sense, it may be compared from the point of view of interpretation to section 27 of the Constitution Act. Section 27 says, and nobody objected to that in 1982, "This charter shall be interpreted in a matter consistent with preservation and enhancement of the multicultural heritage of Canadians."

The wording of section 2 is pretty close to that one and that is exactly what we say for the distinct character, so it is a rule of interpretation that may be important in a given case, and we may come back to this later on--I have two cases before the Privy Council on this--but does not change materially, to start with, the division of power between Canada and the other provinces and does not change the division of power in the sense that Quebec has not additional legislative power.

Section 92 of the British North America Act is the same for Quebec as for the other provinces, but it may influence the interpretation in a given case, as section 27 has changed the interpretation of the Supreme Court of Canada in the freedom of religion, in the big-M drug mart case. Chief Justice Dickson said, "Because of the multicultural character of Canada, the freedom of religion in Canada means" this and this and this. So it is important, but it does not give additional power to one province.

Is Quebec distinct? The concept of Quebec as a distinct society can be traced back to the Quebec Act of 1774. I think we may conclude that it is distinct because it is the only place in North America where a French-speaking community is predominantly speaking a language that is different from the language of all the other provinces. It is the only province having a civil code modelled on the code of Napoleon, while all the other provinces have adopted the common law system of Great Britain, and even Great Britain itself recognized that in 1774, when the Parliament at Westminster in London reintroduced the French civil law in lower Canada.

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Britain itself recognized that in 1774, when the Parliament at Westminster in
London reintroduced the French civil law in Lower Canada.~~

To have a civil code in a British colony is something that is distinct. We do not have that very often in the history of the British Empire, the British Commonwealth, or the British nation. I think it is distinct and it has been like that from the beginning. In that sense, it is distinct.

People say: "Why do you not define the distinct character of Quebec. Why do you leave it open like that." Then the jurists will unanimously, I think, answer, "Well, if we define something in a statute, we are going to limit by definition what the character is." Perhaps they are right. You will say that I am prejudiced, being a jurist myself and I agree, but I think the distinct character of Quebec may change a little bit from one century to another. For example, the same culture and the same language, Quebec is exactly the same in that sense, but perhaps Quebec attaches more importance to linguistic issues than to religious issues. We may see a difference from one century to another. It may be the same thing in the other provinces, but it is certainly the case in Quebec for the school system, for example. Perhaps we are right not to define too precisely what it means.

On the whole, I think we may come to the conclusion that it is really a distinct society. And I will come back to that later on.

People were afraid of that and the multicultural Canadians, if I may use that expression, and the aboriginal people say, "OK, if you do that, put section 16 with a notwithstanding clause in the Meech Lake accord." And they did. I understand that. In my own opinion, it was not strictly necessary, but they did it. They felt that politically it would be a good thing to say that.

There is no doubt that section 27 has been referred to by the Supreme Court and the Supreme Court may refer to the distinct character of Quebec. Again, I do not think it changes the division of power.

We have recognized the right of aboriginal people. We recognize the two major linguistic communities throughout Canada. With the Meech Lake, we are looking at the distinct society of Quebec. I think we just reflect what Canada is about. Of course, there is the difficulty of interpretation, but I think our judges at the Supreme Court level are used to this.

I have quoted also the opinion of Eugene Forsey who said that Quebec is different. "It is the citadel of French Canadians." In a way, I think it is true.

Immigration: I do not want to spend much time on this. What the Meech Lake accord is constitutionalizing is the Cullen-Couture accord that has existed in Canada since 1978.

In conclusion, I think I will say just a few words about centralization and decentralization, because in Quebec, people are *prima facie*, if I may say, in favour of more and more autonomy, but even in Ontario. If we read the history of Ontario, Ontario and Toronto have always been jealous of their autonomy and it is quite understandable. The sentiment may vary from one...

1520 follows

(Mr. Beaudoin)

... province to another.

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I have said a word about the four Prime Ministers of Canada who have been in power for more than 15 years, and all of them, of course, Macdonald, Laurier, King and Trudeau, have very strongly influenced the federalism of their time, but they differed from one to another. Sir John A. Macdonald was in favour of a legislated union. We all know that. He admitted very frankly that he was in favour of a very strong central government. Sir Wilfrid Laurier was quite different, in a way, in the sense that he was against the intervention of Ottawa in the field of education in the Manitoba school question. He created two provinces in 1905. He changed the ?? to the provinces, article 118, so on the whole he was probably more autonomous. I say "probably," because I do not want to have an historical debate. We cannot summarize the life of Sir Wilfrid Laurier and Sir John A. Macdonald in one paragraph. It is impossible.

Mackenzie King ruled for a very long time. The first decade he was more a decentralist than in the next decade when he took power in 1935 and introduced social security. Prime Minister Trudeau lived in a very turbulent and difficult period, as we know. The Official Languages Act, the turmoil of 1970, the Victoria charter, the election of the Parti Québécois, le référendum du Québec, the patriation of the Canadian Constitution and finally, the Canadian Charter of Rights and Freedoms. Obviously, he influenced very strongly the federalism of his time. That federalism was vigorous and we have to remember that at that time a government in Quebec City was interested to attain sovereignty.

Is our country too decentralized? We hear that very often, "Canada is the most decentralized country in the world." Yes and no. On paper our Constitution was very centralized in 1867. The Privy Council decentralized our Constitution. I have put some examples of this at page 41. I do not think we may say bluntly that we are the most decentralized. It depends. In certain fields we are, undoubtedly. In some others, we are not. Without the Meech Lake accord, for example, all senators and judges of higher courts are all appointed by the federal authority alone, which is not the case in the United States, which is a federation like us. So it depends. The Supreme Court of Canada said that there is no standard federalism. It is up to each country to adopt the best federalism for its own need. In the United States history has shown that

la théorie du balancier

sometimes it is centralized and sometimes decentralized. We all remember that Thomas Jefferson in the United States was in favour of autonomy. Alexander Hamilton was for a very strong central government, as Sir John A. Macdonald was. In the long run, Alexander Hamilton won.

In the field of human rights the winner was Thomas Jefferson with the ideal situation where civil liberties are enshrined in the Constitution. Are our individual rights protected? I am sure they are because, I must say, being a director of the Human Rights Centre, I believe strongly in human rights. I must confess that I believe very strongly in the Canadian Charter of Rights and Freedoms. In my opinion, that Charter of Rights and Freedoms is enshrined in the Constitution and is still paramount. I do not think the

Mr. Beaudoin

C-1520-2

Eng/Fr

17

February 3, 1988

character of the distinct society of Quebec will be paramount over the charter. I think it is the reverse; it is a rule of interpretation.

I am of the theory, probably some other professors are like that, Professor Hogg, Professor Lederman and some others . . .

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hm
(Mr. Beaudoin)

~~... will be paramount over the charter. I think it is the reverse, it is a rule of interpretation. I am of the theory, probably some other professors are like that, Professor Hogg, Professor Lederman and some others, that the Charter of Rights, which protects individual and human rights, is still paramount. I cannot imagine that the Supreme Court of Canada will construe, let us say section 2 of the dualism and different character of Quebec as being paramount over the charter. It is the reverse.~~

They will give effect to the Canadian Charter of Rights and Freedoms, there is no doubt in my mind. ??As they have done for the multicultural heritage of Canada, it may come into play as a rule of interpretation in the case of human rights, but it is not paramount in the sense that the Charter of Rights is in the Constitution, it is not only a rule of interpretation, it is substantive, in my opinion, the charter remains as it is. Whether we should say, I think that the distinct character is a factual situation, and in our Constitution there is much more to be gained by saying it than by not saying it.

I conclude. I have been a bit long, I apologize.

Mr. Chairman: That is quite all right. It was most helpful.

Mr. Morin: I will ask my question in English. Is it reasonable in your view to assume that any errors, any omissions, any mistakes that are made right now in the accord could be changed after the accord has been ratified? Or is it cast in stone as finished.

Mr. Beaudoin: Could you repeat the point of your question?

Mr. Morin: Can we assume that if any errors or omissions are detected in the present accord after it is ratified, we could change it, we could bring an amendment?

Mr. Beaudoin: Yes. I think if we discovered that an error has been made, we may come back and make an amendment.

Mr. Morin: How long would that take?

Mr. Beaudoin: That is a good question. It may be very fast, it may be long.

Mr. Breaugh: What a lawyer.

Mr. Beaudoin: Who knows the future? We made a terrible mistake in 1867 when we failed to embody in the British North America Act a formula of amendment. Once Canada became independent in 1931, but we started in 1926, Balfour declaration, Mackenzie King started to make a federal-provincial conference on the formula of amendment. In 1931 the British thought, "Gosh, you are independent now. You need a formula of amendment in your own Constitution. You do not have it." King and Bennett said, "It will not be long, we will find one," but it took 50 years to find it.

It is like reform of the Senate. People say, "When is the Senate going to be reformed?" There is only one answer to that, in my opinion: When people really want to do this, they will find a way to do it. It is like the argument, the unanimity rule, "Not you want to create a province, you need

Mr. Beaudoin

C-1525-2

19

February 3, 1988

unanimity. To amend certain areas of the Constitution you need unanimity. You will never have unanimity.

In 1940 we needed an amendment to the Constitution to give to Ottawa on unemployment insurance. We did it. In 1949 and 1951 we needed an amendment for old-age pension. We did it unanimously. There are at least three or four cases where the unanimity rule was not an obstacle for amending the Canadian Constitution because people wanted to do it. It is the will that is important. The formula of amendment is nothing. It is only in certain areas that we need unanimity but the basic formula is still the same, seven provinces, 50 per cent of the population.

If we discover a tremendous error, we have to correct it right away.

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~~minority. But the basic formula is still the same, seven provinces, 50 per~~
~~cent of the population. If we discover a tremendous error, we have to correct~~
~~straight away. It is a question of opinion, but to me there is not an obvious~~
error. It is a point of view. It is my own point of view.

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It has been accepted by the House of Commons now and the senate has only a suspense of veto. The minute it is accepted by the 10 provinces, the governor general will proclaim the amendment and that is it. So it becomes the law of the land. That is the end of it. If we discover that we have made an error, we may correct that error by another amendment. It is the rule of seven provinces except that in certain areas it will be 10 provinces.

M. Allen: Je voudrais souhaiter le bonjour au professeur Beaudoin parmi nous, membres du comité législatif, ici à Toronto. C'est un grand plaisir pour nous d'être en présence d'un expert constitutionnel, un représentant aussi du droit civil. Vous êtes le premier représentant de cette perspective de la société du Québec que nous avons eu l'occasion de questionner.

A l'égard de la question du droit civil et du caractère distinct du Québec, je voudrais vous poser une ou deux questions. Premièrement, il serait peut-être important que le comité ait quelques exemples de ce que signifie, pour le Québec, la différence entre le droit civil et le droit commun, parce qu'il y a des aspects du droit civil qui pourraient toucher, pour le meilleur ou pour le pire, les droits des femmes et qui sont donc importants aux groupements féminins au Canada en ce qui concerne le lac Meech.

On aimerait savoir aussi ce que signifie la Charte des droits et libertés de la personne du Québec dans le contexte d'autres débats, à l'égard de la Charte des droits et libertés fédérale, et également à l'égard des droits des femmes et des groupements multiculturels. Auriez-vous des commentaires à nous offrir sur ces sujets, et des exemples, comme je l'ai dit, de ce que signifie le droit civil, qui est toujours important au Québec dans ce débat?

Me Beaudoin: En ce qui concerne les droits civils, ce qui est arrivé, c'est qu'après la conquête britannique en 1763, les Canadiens de l'époque, les Canadiens français, vivaient sous les lois britanniques, la «common law» et le droit criminel britannique, et ils se sont adaptés au droit criminel britannique très bien. Ils étaient d'accord. Mais ils voulaient revenir aux lois françaises. Ils disaient, «On est habitués au Code civil de Louis XIV et de Louis XV, aux ordonnances de Louis XIV, et nous aimerions bien pouvoir vivre sous un régime de droit civil.» Londres--et je pense que Londres a fait preuve de beaucoup de finesse, c'était intelligent--Londres a dit, «Bon, d'accord, on va rétablir les lois civiles françaises.»

Après ça, le Québec a continué à avoir son droit civil et Sir Georges Etienne Cartier, quand il est devenu procureur du Bas-Canada, a fait codifier le Code civil québécois en se basant sur le Code Napoléon en France. Le Code civil a été codifié et est devenu une loi en 1866. Sir Georges Etienne Cartier.

1535 follows

~~on se basant sur le Code Napoléon en France, et le Code civil a été codifié et est devenu une loi en 1866. Sir Georges Etienne Cartier avait dit à Macdonald: «Il faudrait que dans l'article 92, on dise "property and civil rights" appartenant aux provinces», parce que le Québec a un droit civil différent, et le Conseil privé a déclaré que l'expression «property and civil rights» dans l'Acte de Québec de 1774 a la même signification que «property and civil rights» à l'article 92 de l'Acte de l'Amérique du Nord britannique.~~

Québec tient beaucoup à son Code civil, pas parce que la «common law» est un mauvais système. Au contraire, la «common law», c'est un excellent système de droit. Le droit civil de France qui a été adapté au Québec et dans 60 pays du monde est également un bon système et c'est une richesse incroyable pour le Canada que d'avoir deux grands systèmes de droit, le Code civil au Québec et la «common law» dans les autres provinces, et c'est une bonne chose. Le Québec veut garder son Code civil parce qu'il est différent de la «common law», parce qu'il se sent à l'aise dans le Code civil. Remarquez que souvent, les solutions sont les mêmes, mais on y arrive par différents chemins. L'esprit est différent.

Cela c'est le caractère distinct du Québec sur le plan juridique. Sur le plan culturel, c'est le seul endroit en Amérique où il y a une majorité de langue française. Alors ça, je pense que c'est vraiment distinct et c'est le seul endroit qui, dans un avenir prévisible en tout cas, va avoir une majorité de langue française et la culture également, le système d'éducation, et en ce sens-là, on peut dire que le Québec est distinct.

Mais sur d'autres plans, on accepte l'uniformité du Code criminel canadien; on est d'accord avec ça. On est d'accord avec le droit constitutionnel canadien, et quand il y a eu un référendum au Québec, le 20 mai 1980, eh bien, la majorité, 60 pour cent, ont voté en faveur du fédéralisme canadien. Le Québec disait: «Oui, ça va nous donner un fédéralisme renouvelé». Moi, je pense que les accords du lac Meech, c'est une forme de fédéralisme renouvelé qui reconnaît que le Québec a un caractère distinct. Mais le partage des pouvoirs demeure le même, la Charte canadienne des droits et libertés demeure la même. Moi, je suis aussi attaché à la Charte canadienne des droits et libertés que le sont mes collègues professeurs de langue anglaise; c'est la même chose.

Ce que j'ajoute à ça, c'est que le Canada, qui est un Etat fédéral, peut très bien reconnaître qu'une province, à cause de son Code civil, de sa majorité francophone, de sa culture francophone, est différente des autres provinces, tout en faisant partie du même pays. Je pense que c'est possible. Je ne pense pas que ça affaiblisse le Canada. Je pense que ça représente le Canada tel qu'il est. C'est cela, le Canada, où il y a deux cultures, il y en a plusieurs mais deux langues officielles, deux systèmes de droit, deux mentalités. Bon.

Maintenant, pour ce qui est de la question des femmes, évidemment, je ne peux pas... peut-être que c'est une femme qui devrait le dire. Peut-être que les femmes disent: «Oui, mais les accords du lac Meech ne nous protègent pas complètement. On devrait peut-être ajouter à l'article 16 que les femmes échappent à la société distincte.» Je suis au courant de ce...

~~... peut être que les femmes disent: «Oui, mais les accords de la Meech ne nous protègent pas complètement. On devrait peut être ajouter à l'article 16 que les femmes échappent à la société distincte.» Je suis au courant de ce débat-là. Moi, je dis qu'il n'est pas, en droit strict, nécessaire de le dire, parce que même l'article 16, d'après moi, n'était pas nécessaire. On l'a fait pour, comment le dit-on en latin, ??«abundantia cante la prudentia». Alors, on l'a fait pour plus de sécurité. Je pense, et j'espère que je ne me trompe pas, qu'une bonne partie des femmes au Québec croient que le caractère de la société distincte ne leur cause aucun souci. Maintenant, il est possible--mais là, ce serait aux groupements féminins de le dire--que dans le reste du Canada, il y ait des doutes.~~

1540

So on the whole, the problem is this, you see. I do not think that, strictly speaking, it is necessary to have the principle of the equality of women and men in section 16, for the following reason. In my own opinion, the character of the distinct society, being a rule of interpretation, the authority of the charter remains complete. It is not necessary to use a "notwithstanding" clause for the Indians nor for the multicultural heritage of Canada, nor for women's equality, because section 28 of the charter says, "Notwithstanding anything in this charter..." the laws apply equally to men and women, so the equality seems to be absolute.

Of course, some groups have said, "We had better not take a chance and we had better stipulate that in the Meech Lake accord." They have. If you have stipulated that for the aboriginal people and if you have stipulated that for the multiculturalism, why not for the women? I may understand that, of course. I am impressed by that, I must confess. But the problem is, if we do not do it, it may be harmful.

If it were strictly necessary to do it for the two others, then of course, I may understand the importance of the argument that it is necessary also for the others to do it. Because, if you include two groups and you exclude one, it may be harmful for the group that is excluded. OK. I agree with that.

But, if it were not strictly necessary to include the first two groups, if you do not include another one, it will not change anything. So the problem now--legally speaking, I may be quite wrong. The Supreme Court will see if I am right or wrong and they have the final say, except that if we are not satisfied, we may amend the Constitution. The Supreme Court may say: "No, no, you are wrong. They are not protected."

But I cannot see how the new proposed section 2, which is a rule of interpretation that does not change the division of power will be paramount over the charter. I cannot imagine that the Supreme Court will say that.

Of course, if women are afraid that the court may do that, of course. They may ask for the addition of this. But again, if you ask my opinion, I think the equality is protected and I even say that, strictly speaking, it was not necessary to have section 16 in the first place. But now it becomes a purely political problem to say whether we should add that to be sure that they are

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(Mr. Beaudoin)

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section 16 in the first place.~~

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add that to be sure that they are protected. Legally speaking, I may be wrong,
but I think they are protected.~~

Mr. Chairman: Mr. Allen, Mr. Cordiano had a supplementary on that.

Mr. Cordiano: Professor, let us take the case, the scenario where
??we are wrong, in the worst-case scenario, where section 16 somehow grants
those rights or elevates those rights, that is in sections 25 and 27.

Mr. Beaudoin: Yes.

Mr. Cordiano: I am referring back now to the testimony we had this
morning from Professor Baines. I am sure you are familiar with what she said.

Mr. Beaudoin: Professor Lederman?

Mr. Cordiano: No, Professor Baines from Queen's University.

Mr. Beaudoin: I think women do not agree internally between
themselves also.

Mr. Cordiano: That could be the case, but I--

Mr. Beaudoin: Because in Quebec I discussed that with certain
professors at Laval University and they said, "Well, we don't see any
problem." I suppose women disagree between women as we disagree between men,
too.

Mr. Cordiano: We will find that out, I am sure, in the days ahead.

Mr. Beaudoin: Yes.

Mr. Cordiano: But my point here is let us take the worst-case
scenario, that section 16 somehow does not include section 28 or any other
section of the charter, and those are the equality provisions.

Professor Baines, this morning, suggested that women can be viewed as a
cultural grouping, if you will. I asked her what her definition of
multiculturalism was and that included all Canadians. I think most of us would
agree that all Canadians are considered to be of some multicultural heritage
and therefore, we are all included in that section.

Mr. Beaudoin: We are all included in that--

Mr. Cordiano: Men, women, English, French and whatever other
heritage group you have or wherever else you come from. That is the meaning of
multiculturalism. So she suggested that indeed you could view women--that
there is a cultural grouping there for women. That is, that women may share a

Mr. Cordiano

C-1545-2

24

February 3, 1988

set of cultural values and that if you did that, then section 16, in a strict technical sense, would include women's concern about having been included in section 16.

Because, if you view women's groups as a cultural grouping then, under the strict section 16, it could be referred back to section 27 of the charter and that would basically go along with the argument that they are a multicultural group.

Mr. Beaudoin: I wonder if they are not afraid of something else. Suppose Quebec is enacting a law in its field, section 92. And suppose, to promote the character of the distinct society of Quebec, there is inequality between men and women in that act.

Then they are probably afraid that the court may say, "Yes, there is inequality between men and women, but we accept that because it is for the distinct character of Quebec." I think this is what they may fear.

OK, but if a judge says that, in my own opinion it is a very bad judgement because the equality between men and women, in all laws of this country, federal or provincial, is--again in my opinion--guaranteed by section 28. Why? Because section 28 says, and I read it, "Notwithstanding anything in this charter,..." even section 1, even section 15, even section 33, because there is a "notwithstanding" clause in the Constitution. But section 28 says, "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

~~It is hard to find something that is not equal and that, "Notwithstanding anything in this charter..." So if a law of Quebec, and Quebec is bound by section...~~

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~~There is a "notwithstanding" clause in the Constitution, but section 28 says,~~
~~"Notwithstanding anything in this charter, the rights and freedoms referred to~~
~~in it are guaranteed equally to male and female persons." It is tough to find~~
~~something that is more equal than that, notwithstanding anything in this~~
~~charter.~~

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So if the law of Quebec--and Quebec is bound by section 28--promotes a distinct society, I think the law will be declared invalid and as encroaching on section 28. I discussed that with some colleagues and they said, "Yes, but a judge in certain provinces said that it is acceptable." In my opinion, that is a bad judge.

Is the Supreme Court going to give precedence to equality? Because section 28 is not only a rule of interpretation, it is a substantive rule. It is not interpretation, it is law. Rights and freedoms are equally guaranteed to male and female. It is always possible that a judge may rule that way, but to me, he would go against the wording of section 28 if he says that equality between men and women may be set aside by the distinct character of Quebec as a simple rule of interpretation.

In law, I feel secure. Politically, probably section 16 was added for policy reasons. I can understand why people are knocking at the door of the government again. They say, "If you do that for two others, why not for us?" And they understand that.

Whether they may open the door and add that protection, even if it is not strictly a necessity, it is up to the politicians to do that. I am not a politician, I am a jurist. If you ask me whether it is strictly a necessity, I say no, I do not think so. If you ask me whether a judge may rule otherwise, of course, I am obliged to say it is possible. Of course, it is possible.

As a matter of fact, we have a court of first instance, a Court of Appeal and the Supreme Court, and this is what a court is about. It is to correct the errors of the other judges. The Supreme Court of Canada is the final stage and it is right because it is the Supreme Court.

I do not think, again, in pure law, that it is necessary. You may say, "But prudence and politically and for all others." I understand that.

Mr. Chairman: I wonder if I can put one question, and then I have Mr. Morin and Miss Roberts for questions.

One of the issues that is bound to come up--and we have not really addressed it specifically; you touched on it--relates to the minorities. Assume for a moment I am an anglophone in Quebec compared to a francophone in Ontario. As Charles Beer or Charles de la Beer, I have concerns about the accord and what it is going to do to my rights. Assuming that the accord has become part of the Constitution, how does the anglophone Quebecker fit into the distinct society and how are his rights affected or not affected in your view? The francophone in Ontario, how might his rights be affected, if at all? What are

C-1555 follows

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(Mr. Chairman)

C-1555-1

26

February 3, 1988

~~How does the anglophone Quebecer fit into the distinct society, and how are his rights affected or not affected in your view? The francophone in Ontario, how might his rights be affected, if at all? In the grey areas in terms of the differences as a result of the "distinct society" clause in terms of those two different minorities?~~

Mr. Beaudoin: I start first with the anglophone in Quebec. The clause says that Quebec is a distinct society. I think the anglophones, in Montreal mostly, are divided. I spoke with some of them and they say: "I do not fear anything at all. I am part of that distinct society." Many of them, of course, speak French and they are involved in French activities and so on. They say, "It is all right with me." Some others say: "No. It gives a distinct character to Quebec, un statut particulier, and this is basically wrong."

I may understand that after the Meech Lake accord of April 30, some people might have thought that way. I may understand that. But we have to remember that on June 3, in the middle of the night, the 11 first ministers added clause 24, saying that it does not change the division of power. This to me is fundamental.

If they are saying in the section and article of the Constitution that the character of the distinct society in Quebec does not change the division of power, it means that Quebec has the same power as the other provinces, not more, not less. It means that Quebec has not legislatively a particular status, but it does mean that in some areas, the character of the distinct society of Quebec may influence the courts in construing the Constitution. But it will influence the courts not for Quebec only but for all provinces. This is what people forget about it.

For example, we have two cases of the Privy Council that say exactly that. In the ??Parsons case, 1881-82, the question was whether insurance was provincial or federal. The Privy Council said that insurance is not stated in the British North America Act, but it is provincial because it is a contract. A contract is part of the property in civil rights. Then it said very bluntly that because Quebec has a civil code that is different from the common law of the other provinces, to rule otherwise would be bad for the specificity of the Quebec civil code.

That is exactly what a distinct society means. It may influence the court when the court says what is provincial and what is federal. But once they have been influenced, their decision is binding on all provinces. It does not mean that Quebec will have the right to rule on insurance and the other provinces will not have that right. The Privy Council said insurance is therefore provincial, but it is provincial for any province. Any province may rule on insurance. So that is exactly a case where the distinct character of Quebec has influenced the Privy Council.

There is another one. In 1937, after Canada became independent, the question was what happens if Canada is signing an international treaty. Who is going to sign, and after the treaty is signed, what are we going to do?

C-1600 follows



(Mr. Beaudoin)

... In 1957, after Canada became independent, the question was: "What happens if Canada is signing an international treaty? Who is going to sign, and after the treaty is signed, what are we going to do?" The Supreme Court and the Privy Council said, "It is Ottawa alone that may sign the treaty," for example, the free trade agreement. Obviously, it is the Prime Minister of Canada, the government of Canada, who may sign the treaty with the United States. OK.

1600

Who will implement the treaty? That is the question. The answer is in all federal fields, Ottawa may legislate to give effect to a treaty. In all provincial fields, the provinces may give effect to the treaty. If the treaty is entirely federal, there is no problem. Ottawa is legislating, implementing the treaty, but the Privy Council said--we have to examine each case--"If the treaty is concerned also with provincial matters or uniquely with the provincial matters, the provinces will implement the treaty, will legislate to give effect to the treaty and then the Privy Council said: "If Ottawa cannot legislate in the field of civil law, because civil law is provincial, it cannot do it by entering into a treaty with another nation and then implementing the treaty in the provincial field. We have to follow the division of power inside and for outside treaties," and then referred to the Quebec Civil Code. So those are the two examples. Perhaps there are others, but I found two?? where the supreme tribunal said, "Because of the character of Quebec, we rule that way."

So it means what? It means that the distinct character of Quebec may at a given moment influence the division of power. Can the distinct character of Quebec influence the interpretation of the charter? It may, but it will not change the charter in my own opinion.

We were discussing a moment ago the equality of men and women. To me it is a fundamental character of our Constitution that men and women are equal. Are we going to change that because of a rule of interpretation? I do not think so. Again, I must say it is my humble opinion--I share that opinion, of course--that it is up to the Supreme Court to say yes or no. So this is for the distinct character of Quebec.

Some English-speaking Quebecers say, "Perhaps the distinct character will be more important than my own individual rights, and then I do not like it." Some of my good friends in Montreal think that way, and some of my good friends think the other way. I cannot imagine for a moment that the Supreme Court will set aside clear-cut individual rights in the name of the rule of interpretation. I cannot imagine that.

Now for the francophone outside Quebec. The word "promouvoir" is no longer in section 2. I am sure that the francophone or Quebecer would like to have more than what we have now, and I understand them obviously, but I fail to see what is lost in section 2. I think they gained something in the sense that linguistic duality is enshrined in the Constitution and is declared to be a fundamental characteristic of Canada. The word "fundamental" in constitutional law is fundamental. There is nothing more fundamental than the word "fundamental" in constitutional...

1605 follow

~~... linguistic duality is enshrined in the Constitution and is declared to be a fundamental characteristic of Canada. The word "fundamental" in constitutional law is fundamental. There is nothing more fundamental than the word fundamental in constitutional law. And even the nationalists in Quebec say, "You did not see that société distincte is not a fundamental character? But linguistic duality is a fundamental character." Some people in Montreal say: "You see now that 'société distincte' means nothing. It is not even fundamental. It is a rule of interpretation."~~

This is exactly what my colleagues at the Université de Montréal have said. They say what is fundamental in the Meech Lake accord is the linguistic duality. It is not the société distincte. So in that sense, my own opinion is that the francophones are gaining something. I am sure that they do not gain as much as they would like to gain. That is quite true. The Fédération des francophones hors Québec sûrement va demander plus, there is no doubt. I cannot object to that, of course.

If you say, in other words, it is a gain--c'est un gain, je ne sais pas si je peux employer ça--probably not enough, but it is better than the status quo. The fact is that caractéristique fondamentale, which is very strong is law, is important and is important also for the English-speaking Quebecers. If it is important for the francophone in Quebec, it is equally important for the anglophone in Quebec. There is something parallel here.

I know what you will say, finally. People will say, "It is so complicated that we do not know how the Supreme Court is going to consider all this." Well, it is part of its job. They are there to rule. Take, for example, the abortion case, it is a very difficult question. They had to rule on it. Euthanasia. They will have to rule on this. Thank God we do not have the death penalty, so they will not have to rule on this, but that is another difficult problem. Euthanasia, abortion and death penalty. It is difficult to find something more difficult to rule on in law, but they have to do it; it is their job. They will do it.

"Distinct society" is a concept like multicultural heritage, like Canadian linguistic duality, like emergency power, like peace, order and good government, like property and civil rights, the right to opt out and equalization payments. We have a dozen of global expressions in our Constitution. Of course, the professors of constitutional law are probably fascinated by that, and the judges have to rule on this. It is not just as opinion; they have to rule on it. But it is part of our system.

You will say, "Yes, but if you give too much power of interpretation to the judges, we are governed by people who are not elected." Well, that is another debate. That is not the debate of Meech Lake. It was the debate since 1867. It was the debate in 1982 when we enshrined the Charter of Rights in our Constitution, which in my opinion is the biggest revolution since 1867. Of course, the Meech Lake accord is an important document. It is probably the third one that is as important as that.

M. Morin: M^e Beaudoin, est-ce que l'entente a réellement pour effet d'unifier le pays et de ramener le Québec au rang de la constitution? C'est ça qui est le but.

Me Beaudoin: Là, évidemment, il y a des opinions divergentes, comme vous le savez. Il y a des gens qui disent: «Bon, le Québec est lié par la loi de 1982. La Cour suprême a dit que le Québec n'a pas le droit de veto. Donc, légalement, on n'a pas besoin de l'accord du lac Meech.» Légalement, c'est vrai. Le Québec fait partie du Canada. Le Québec a...

C1610 follows



1610

Me Beaudoin: ~~Il y a des opinions divergentes, comme vous le savez. Il y a des gens qui disent: «Ben, le Québec est lié par la loi de 1982. La Cour suprême a dit que le Québec n'a pas le droit de veto. Donc légalement, on n'a pas besoin de l'accord du lac Meech. Légallement, c'est vrai. Le Québec fait partie du Canada, le Québec a toujours fait partie du Canada et qu'il y ait des accords du lac Meech ou non, légalement le Québec fait partie du Canada. Il n'y a pas un juriste qui conteste ça.~~

Politiquement--et ça, je pense, c'est le but des accords du lac Meech--c'est de faire en sorte que le Québec revienne autour de la table de négociation, qu'il soit membre de la famille, qu'il mange avec tout le monde au repas du soir et qu'il se sente à l'aise. Mais c'est une question débattable.

Bon. Au Québec, je pense bien qu'il y a une grande majorité qui est favorable aux accords du lac Meech. Il y a une minorité nationaliste qui dit: «N'acceptez pas le lac Meech. Vous reconnaissez le pouvoir de dépenser, vous liez le Québec et puis ça ne donne pas assez au Québec.» Et puis enfin, il y a un groupe de Québécois aussi qui disent: «Le prix est trop élevé pour avoir le Québec dans la famille.»

Bon. Cela, disons que c'est au Québec. En Ontario ou dans d'autres provinces, les gens disent: «C'est bien beau, mais le prix est élevé.» Moi, je me dis que le Québec a clairement manifesté son désir de continuer à faire partie de la famille canadienne. Il l'a dit clairement. Les accords du lac Meech donnent quelque chose au Québec qu'il n'avait pas.

Est-ce que le prix que le Canada paie pour le retour du Québec est trop élevé? Est-ce que ça va affaiblir le Canada? Eh bien, il y en a qui disent: «Oui, ça balkanise le Canada, ça donne trop de pouvoir aux provinces.» On aurait pu imaginer des accords Meech différents; on aurait pu imaginer que le Québec ait un certain statut. Mais je me dis, c'est tout de même les 11 premiers ministres qui sont tombés d'accord, et moi, je me dis, avec la constitution telle qu'on l'a, même avec les accords du lac Meech et avec une Cour suprême dont le devoir est de garder le Canada ensemble et non pas de l'éparpiller, je crois que les accords, même si ce n'est pas parfait--il n'y a pas de compromis politique parfait; même si j'ai beaucoup de respect pour les hommes et les femmes en politique, parce qu'ils font un travail formidable, il n'y a rien de parfait. Je me dis que les accords du lac Meech ne sont pas parfaits, mais ils sont acceptables. Si on dit non au Québec, il me semble que c'est mauvais pour le Canada de le faire à ce stade-ci.

Maintenant, je suis le premier à dire qu'on aurait pu trouver mieux, peut-être. Mais vous savez que si on remet les accords du lac Meech devant les 11 premiers ministres et si on commence à l'amender beaucoup, eh bien, il y a des chances pour que ça tombe à l'eau. A ce moment-là, les Québécois vont dire: «Ben, coudon! C'était tout de même un arrangement qui était raisonnable. Pourquoi est-ce que ça n'a pas été accepté?» Alors moi, je pense que ça peut être accepté et je suis confiant que les premiers ministres et la Cour suprême vont trouver le moyen de garder un Canada uni. J'ai confiance là-dedans.

Miss Roberts: If I might, professor, I will be brief. I would like to turn from the content to the process, maybe. It has been suggested to us that maybe a reference could be used to clarify some of the points, indeed section 16 of the accord. You said that is the Supreme Court's job; it is a dirty job but somebody has to do it.

Mr. Beaudoin: I did not say "dirty job." I would not dare.

~~MISS ROBERTS: Well, I am~~

C-1615-1 follows.



~~Miss Roberts: If I might, professor, I will be brief, but I would like to turn from the content to the process, maybe. It has been suggested to me that maybe a reference could be used to clarify some of the points, indeed section 16 of the accord. You said it is the job of the Supreme Court; it is a dirty job but somebody has to do it.~~

~~Mr. Beaudoin: I did not say, "dirty job." I would not dare~~

Miss Roberts: Well, I dared. The Supreme Court has to do that, but what I would like to know: Is it a possibility or is it appropriate for us to be looking at a reference of some type? Is this going to be more harmful than helpful? Is there a way of framing a reference in some way that is appropriate? You seem to say that the accord is there, and we should go from that point onward.

Mr. Beaudoin: It is always possible for the government of Canada to put a reference case before the Supreme Court, to ask for priority and to ask for an opinion. As a matter of fact, it has been done in the past. It may be done. It may delay, of course, the procedure of ratification of the Meech Lake accord; but, if you ask me whether it may be done, certainly, it may be done. The provinces may do that before their Court of Appeal, and they have done.

The Premier (Mr. Peterson) did it with Bill 30, I think, with the financing of the school board, for example.

Miss Roberts: My question, though, is that I know that it can be done, but what is your opinion as a jurist as to whether or not it is an appropriate thing with respect to this particular accord and the process that has gone on before?

Mr. Beaudoin: It is always the same argument. If you open the door for one, you open the door for all the others. It is like section 16. If they had not opened the door for the aboriginal people and for the multicultural heritage, perhaps nobody would have knocked at the door. But if you do that now for the equality of men and women--and I may understand that--then you play with the Meech Lake accord. It has to be done within three years and there has only been one year that has elapsed.

My impression is--of course, you would not say that is not juridical--politically it is suicide if a government would go contrary to the principle of equality, to establish a distinct society. What kind of distinct society would that be where men and women would be unequal? I cannot imagine the Premier doing that but, of course, you will say that is politically; but politics is very important. The women may defeat a government--obviously, they are much wanted--but that is purely political. I agree with you.

I think it may be done. Whether it should be done, I have to be logical and say that I do not see the necessity, unless the Prime Minister or the Premier says, "Well, politically we better do that because..." but, strictly speaking, I do not see it.

Obviously, in the case of aboriginal people, sections 25 and 35 are so strong that, obviously, the distinct character of Quebec will not change in any way the rights of the Indians. They cannot change that. If it were a legislative power, then they would be entirely right. Probably they will say that they disagree with me on that point.

Mr. Harris: Actually, I have got one other question, too. By the time we have finished this hearing process--and I do not say it to prejudice my thoughts on it--I think we are going to be tired of section 16. Let me ask you this. Do you know of any jurisdiction or anybody who wants to put any interpretation on the equal rights of men and women other than the one that you are giving us and the one that you think will be paramount...

C-1620-1 follows.



(Mr. Harris)

~~my thoughts on it, but I think we are going to be tired of section 16.~~

1620

~~Let me ask you this. Do you know of any jurisdiction or anybody who~~
~~wants to put any interpretation on the equal rights of men and women other~~
~~than the one that you are giving us and the one that you think will be~~
~~present that is there? Various groups have said that they feel that they may~~
be in jeopardy by not being specifically mentioned in section 16.

You have also said that the Constitution will be amended in the future when there is a will and when people want to amend it. Do you know of, or have you ever heard of anybody who wants to put the interpretation on the omission of equality rights in section 16 that can say it does not have priority? I do not know all the legal words. Or primacy over the charter? Do you know of any?

Mr. Beaudoin: Do you know of somebody who would object to that?

Mr. Harris: Yes.

Mr. Beaudoin: If it is added I do not object to that.

Mr. Harris: No, what I am saying is, that---

Mr. Beaudoin: I believe in the equality of men and women.

Mr. Harris: Women have expressed the concern that the Supreme Court is going to rule by omission, by not being mentioned in section 16. It was the intention of the drafters that it not have the same primacy. Women have suggested that.

I guess what I am asking is, have you ever heard of anybody anywhere in the country suggest that in fact is their intention in leaving women's rights out of section 16 and it was not putting section 28?

Mr. Beaudoin: This would be from the government in Quebec City. I cannot imagine for a moment that to promote the distinct character of the society of Quebec, a Premier in Quebec City will say, "okay, we will go against the equality of men and women." Good luck. It is suicide.

The legal argument is if it were strictly necessity to include in section 16 the aboriginal people and the multicultural heritage, if it were a necessity and if you do not include the equality of men and women, then you may perhaps say that if you exclude one and include two, the excluded category has no equality. To that argument I answer it was not strictly necessity to include the aboriginal people and the multicultural heritage, so the exclusion is not on purpose. That is the argument. I did not listen to the testimony of Madame Baines. I do not know exactly what she said. Perhaps she would have convinced me, I do not know.

Mr. Harris: Let me phrase it this way. Have you ever heard any defence of why it is not in section 16 other than it is not necessary?

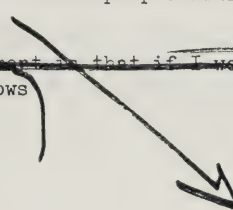
Mr. Beaudoin: No I have never ever heard of any other reason than that one.

Mr. Harris: I have not. I cannot imagine that you are going to hear anything else, other than it is not necessary.

Mr. Beaudoin: I remember having discussed with a colleague of mine in my own faculty, women. He said, "you may be right, but there is a judge, and I will not name the province--there is a judge who said the contrary." And I said, perhaps I went a bit far, that the judge was probably not too good. She replied, "yes, but it is the judicial power who said that." I said, "yes, but it is not the Supreme Court of Canada."

Could you imagine that the Supreme Court of Canada and we have two women now on the Supreme Court of Canada and they are there, I must tell you and strong and they are very strong. Could you imagine that they will accept inequality? Of course people will say, "oh yes, but you are a man. You are not a woman."

~~My argument is that if I were convinced that~~
C-1625-1 follows



ms.
(Mr. Beaudoin)

C-1625-1

36

February 3, 1983

~~... how come the Supreme Court of Canada and they are there, I must tell you, and they are very strong. Can you imagine that they will accept inequality?~~

~~... Of course, people will say: "Oh, yes, but you are a man. You are not a woman."~~
"No, my argument is that if we were convinced that it is a real necessity, I would say yes, open section 16 and add that, rightly or wrongly, ??de bon fai, in good faith, I do not think it is necessary. Politically, this first minister may say, "OK, we better not take any chances." They may do it, but if you ask for a pure legal argument, I do not feel the necessity of that, because if you want to protect everybody from every bad judgement, good luck. It will be long.

The problem to me is important because it is not only a legal problem; it is a political problem. It is a sociological problem. Mind you, I stated the other day that we have too many "notwithstanding" clauses in our Constitution, and the Supreme Court in Bill 30 in Ontario said that in the given case, it was necessary to have the "notwithstanding" clause. As a matter of fact, the example is coming from very high authority.

In 1867, the Parliament at Westminster used a "notwithstanding" clause in section 91 and used a "notwithstanding" clause in section 92. Can it be better than that; the two most important sections of our Constitution have already a "notwithstanding" clause. And we Canadians legislate as if the Constitution were a statute and we use a "notwithstanding" clause very often.

Perhaps we are overprudent, but the difficulty of this case is that if you are overprudent for A you should be overprudent for B. That is the difficulty and to that I answer, as a jurist, if you are overprudent in one case and it is not necessary, you do not have to be overprudent in another case. But that is purely reflects the jurist in me. It is not political.

Mr. Allen: I want to turn for just a moment to the politics you referred to because in terms of the larger politics of those questions, it has been said, for example, that if one sacrifices Meech Lake for whatever reason, that you in fact weaken the politics of aboriginal rights in Canada because Quebec has moved further with respect to recognizing self-determination of native peoples than other provinces and therefore, to have Quebec in is to assist the whole process.

What I want to ask you is specifically with respect to women. Coming back to the question of the civil code and distinct aspects of law in Quebec, is the case strengthened for women in terms of the politics of the question by having Quebec fully in the councils of the nation by virtue of aspects of a civil code which pertain to and might perhaps strengthen women's rights in the country as a whole, just by being there? Are there examples you can give us of the place of women in law in Quebec that perhaps are stronger than in the rest of the country? For example, in my own limited know, I know that the property rights of women were much more strongly and much earlier recognized in Quebec than in the rest of the country. There may be others that I am not aware of.

Mr. Beaudoin: Yes, that is a good question because the civil code of Quebec has been amended and is going to be amended tremendously in the years to come because the government of Quebec has established a reform commission of the civil code and by the way, women are on the board too. We are very careful. Those women do not feel anything. Of course, we debate the question ...

1630 follows



Of course, we debated the question in Quebec, whether the civil code is bound by the charter. If I had to say yes or no, I would say yes. Does this mean that I fear for the equality of men and women under the civil code? Perhaps at the beginning of the 19th century when the code was made in France, obviously women had not the equality, but they were not in common law either.

1630

Today, we amend the civil code more and more to give that equality. I cannot see how the civil law of Quebec may be infringing on the equality of men and women or section 28. You may perhaps have the women here from Quebec to testify on this, but my impression is that the Quebec women do not object to that. On the contrary, they feel more secure.

Is the civil code protecting more the equality of men and women than the common law? I am not a great expert in comparative law, but my impression is that the civil code is certainly not less respectful of equality. If I have to say something, it is certainly at least if not more respectful of equality. Why do I say that? It is because the subject is debated in Quebec and the women who are on those boards would know pretty well. If they do not object, it is because they feel their rights are not infringed by the civil code of Quebec.

Of course, people will say, "That is all right for the civil code." Quebec is paramount in the field of the civil code and obviously Quebec is not going to create inequality between men and women, because it is political suicide. They may say, "Yes, but in a statute that is not in the civil code?" We have the charter of rights of Quebec that says bluntly that men and women are equal and this is paramount over the laws of Quebec. So rightly or wrongly, I must conclude that this equality is respected. So I do not fear anything there.

In addition, you have section 28. Section 28 is in the Constitution. It is not only a statute, it is in the Constitution. We cannot use--that is my opinion--the "notwithstanding" clause to get rid of the equality of men and women. This, in my own opinion, would be contrary to section 28. Why? Because section 28 says, "Notwithstanding anything in this charter." So notwithstanding even section 33, which allows you to use the "notwithstanding" clause. If the word "notwithstanding" were not in section 28, then I think they would be quite right. But since the word "notwithstanding"--and it is the first word of the article--I cannot see in law a better way to protect the equality of men and women unless you use the word "notwithstanding" twice.

Mr. Chairman: You said earlier that you had some humble opinions. We want to thank you very much for coming here today and offering a number of perhaps humble but none the less, I think, carefully thought-out opinions that will certainly add to our knowledge and understanding of the accord, which we are trying to grapple with. We are grateful that you could spend this time with us and we thank you for being here this afternoon.

Me Beaudoin: Merci. C'est un honneur, Monsieur le Président, et je vous remercie de m'avoir invité.

M. le Président: Cela nous a fait plaisir.

Mr. Chairman

C-1630-2

Eng/Fr

38

February 3, 1988

We will reconvene here tomorrow morning at 10 o'clock. This session stands adjourned.

The committee adjourned at 4:34 p.m.



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(Printed as C-3)

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, FEBRUARY 4, 1988

Morning Sitting

Draft Transcript



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Witnesses:

Individual Presentations:

Smiley, Dr. Donald V., Distinguished Research Professor of Political Science,
York University

Cook, Ramsay, Professor of History, York University

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

~~Thursday~~

, February 4, 1988

The committee met at 10:11 a.m in committee room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: Ladies and gentlemen, good morning. We begin our third day of testimony. If I might, I will call Professor Donald Smiley to come forward to one of the seats right in front. Professor Donald Smiley is the distinguished research professor of political science at York University. If I am correct, I think I should also add that for many years he was at the University of British Columbia. I will note that western element as we begin the proceedings.

It is a pleasure for us to have you here this morning. As I think you are aware, we have had two days of testimony and today will mark the third and final day for this week. I think perhaps the best thing is to turn the microphone over to you. If you want to tell us how you would like to proceed, we are in your hands.

DR. DONALD V. SMILEY

Dr. Smiley: Thank you very much. It is a privilege to give testimony before this committee. I saw the last hour of yesterday's testimony and Gérald Beaudoin is an impossible act to follow. I have admired him, and his lucidity, legal learning and great expansive good humour made him no doubt a very attractive witness.

I propose to read a relatively short statement, which I think has been distributed. In whatever time is left after that, perhaps we can have somewhat of a dialogue elaborating on any of these points or expanding a little and so on.

In general terms, I believe that the Meech Lake accord is an act of constructive political accommodation among the 11 governments and on that basis I am concerned that the accord might become unravelled. Although Quebec separatism is now weak and in disarray, it seems to me likely to recur in some form. When it does, and if the Meech Lake accord has been rejected, the separatists will almost certainly point to the failure of even the limited changes requested by the Bourassa government of the 1985-87 period as proof that any defensible constitutional accommodation between Quebec and English-speaking Canada is impossible. It seems to me that opponents of the accord do not take this major political risk into account.

I think I could add parenthetically that I feel very much that Ontario has a central role in this whole thing. It was just 20 years ago in November when Premier Robarts broke the constitutional logjam which existed at that time and convened the Confederation of Tomorrow Conference. I think he really was the initiator of the process in which we are still involved. Since that effort, there has been, in successive Ontario governments, a very commendable

attempt at playing a constructive role in relations between Quebec and the wider Canadian community.

I want to make a couple of points. There are parts of the accord I do not like, but they are not the points that other people do not like. One of them is what I think is really a de facto constitutional amendment made by executive agreement relating to the appointment of senators in this so-called interim period. One senator from Newfoundland has already been appointed under this new interim procedure. I have some doubts about amending the Constitution, in fact, by executive agreement.

There is another point of the accord I do not like very much. It is this provision for annual constitutional conferences. I would hope that there will be a point when we will not have so much constitutional reform on the agenda, when the Constitution settles down and groups cease to pull the constitutional lever so often.

Despite these objections that I have, and almost anyone who reads the accord has, it is a fairly accurate reflection of the values and interests which impinge upon Ottawa and the provincial governments. I think any attempt to renegotiate the accord in significantly revised terms runs the very great risk that no agreement at all will be concluded.

Second, and this is a personal point, I suppose, I do not support the accord simply because I have a knee-jerk reaction to support anything that the political authorities in Quebec say they want. Ten years ago, I was looked upon as somewhat of a hawk on Quebec. I rejected the then popular idea that we should entrench in the Constitution the absolute right of Quebec to self-determination. I thought that the rest of us should turn down sovereignty-association, the "association" part of sovereignty-association as proposed by the Parti québécois and so on.

But it seems to me that these reforms embodied in Meech Lake are moderate and acceptable. They embody what I call Quebec province-centred federalism, the kind of thrust that has been behind the successive provincial Liberal parties in Quebec under the leadership of Jean Lesage, then Claude Ryan, and twice, Robert Bourassa. This kind of emphasis within Quebec looks to the political authorities of Quebec as the primary defence of distinctively Quebec values and interests, but it believes that these can be effectively safeguarded within the Canadian federal system. I think we should remember in this context that Claude Ryan, as well as Pierre Trudeau, was a leader of the federalist forces in the 1980 referendum campaign.

I would like now to turn my attention briefly to the three clauses of the accord which are the most contentious--the "distinct society" clause, the provision related to shared-cost programs and the provision related to the constitutional status of the Yukon and the Northwest Territories.

I hesitate at this part of my testimony because you have been exposed to three of the most distinguished constitutional lawyers in Canada this week: Bill Lederman, I suppose the dean of Canadian constitutional lawyers, my colleague Peter Hogg and Gérard Beaudoin. So I am going to try to avoid purely legal points. I hope the committee will not pay any attention to witnesses who try to be constitutional lawyers but really are not. Certainly, after the legal advice you have had from these three distinguished gentlemen, you are well equipped there.

The "distinct society" clause: One has had distinguished constitutional

lawyers giving contradictory views of how the courts might interpret the provision of the accord recognizing Quebec as a distinct society. There are polar positions. According to one, and I do not think many people have a position quite this extreme, so far as Quebec is concerned, or people and groups within Quebec, the charter rights could virtually be nullified by bringing the distinct society position into play.

Then there is the other position, as enunciated by Peter Hogg and, I think, Bill Lederman, that the "distinct society" clause is an interpretative phrase, that is has largely symbolic value and would not, could not and will not be used to override the charter rights in Quebec. I do not want to get into that at all.

Let us look at the matter in a sort of nontechnical way. I think we can say that in the last quarter century successive governments in Quebec have been at least as solicitous of human rights as the political authorities in any jurisdiction in Canada. I see no reason to expect this will change.

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It will of course be argued that the purpose of the Canadian Charter of Rights and Freedoms is to restrain governments that act illiberally. The charter is in place for bad times for human rights, not benign ones. Remember, however, that if illiberal measures should emanate from Quebec, if these were to succeed, in the final analysis they would have to pass the scrutiny of the Supreme Court of Canada and if this body is insensitive to human rights, whether the challenges come from Quebec or anywhere else, we are all in a rather bad way.

One almost forgotten part of the constitution of the agreement is that it entrenches a permanent non-Quebec majority in the Supreme Court of Canada. I would expect, on the basis of past experience and my own judgement, that these non-Quebec judges, as members steeped in the traditions of the common law, with its individualistic sort of connotations and emphasis, would be extremely reluctant to override charter rights in the name of collective values related to the distinct society.

Historically, back in the 1940s or particularly in the 1950s, the Supreme Court of Canada turned down a good deal of rather repressive Quebec legislation, "distinct society" legislation if you like, impinging on the Jehovah's Witnesses and alleged communists. They did not even have a Diefenbaker Canadian Bill of Rights and they did not have a charter, but they were able, mainly on division-of-powers grounds, to do that, so I can be reasonably relaxed about the "distinct society" clause.

The second contentious provision relates to future national shared-cost programs. In one sense, the charter gives Ottawa the explicit powers to spend within areas of provincial jurisdiction and under some conditions to impose conditions of expenditure. It does not have that explicit power now. Also, the Meech Lake accord relates only to future programs. It has no impact on such things as the national medicare or hospital insurance programs we have today.

Conditional grant programs, shared-cost programs have been important and are important in the development of the Canadian welfare state and, I would argue, of Canadian nationhood more generally, but I would expect these arrangements to be less important in the future than they have been in the past. I do not have any specialized knowledge of the matter and I may get into trouble here, but day care is the only major shared-cost program, it seems to

me, that is under discussion. It would be my amateur's judgement that in that field one would want a pretty flexible kind of arrangement that allows for experimentation and so on. In other words, it would be the kind of program where it would be most unwise to start out with detailed rigid national standards.

However, on more fundamental grounds, I think opponents of the proposed new section have a good deal more faith than I have in Ottawa's judgement with regard to these matters and a good deal less faith than I have in the judgement of the provinces, who are after all carrying out their own jurisdictional responsibilities.

The third contentious provision of the accord relates to the provision that new provinces can be created only with the consent of Parliament and the legislatures of all the existing provinces. Prior to 1982, Ottawa, the federal authorities, had the exclusive jurisdiction to create new provinces as long as this did not impinge on the boundaries of existing provinces. Six of the 10 provinces came into Confederation from 1870 to 1949 without the advice or consent of the pre-existing ones. However, this was changed in 1982 in a very fundamental way by requiring that new provinces could come into the federation only with the consent of the Parliament of Canada and two thirds of the provinces having in total half the population of all the provinces.

Although the Meech Lake accord stiffens the requirements for creating new provinces, it would seem unreasonable to me to contemplate the establishment of provinces in the Canadian north in the foreseeable future. The conferring of a full range of provincial jurisdiction on two or possibly three jurisdictions in an area that has in aggregate fewer than 100,000 people and is continental in size seems inappropriate. Unless very large discoveries of natural resources are made in the north, the Yukon and the Northwest Territories will have very limited public revenues to provide inevitably costly services in this huge area. Furthermore, if they became provinces on a full scale and if these natural resources were discovered, they would come under the ownership of a relatively small number of Canadians.

Furthermore, the creation of one or more new provinces would create new rigidities in the amending formula. It would allow four of the provinces collectively, with an aggregate of perhaps six per cent, seven per cent or eight per cent of the population, to challenge changes in the Constitution wanted by Ottawa and the other provinces.

The status of the political authorities in the north is changing. It has changed rather rapidly in the past generation, although it is unreasonable to expect new provinces. Other federations such as India, Australia and Yugoslavia have provisions in their constitutions in which subnational jurisdictions have different kinds of jurisdiction. It seems to me that is quite an option in Canada, that the Canadian north be constituted with some special, constitutionally protected status other than that of provinces.

I am going to go on to an extraordinarily contentious part of this whole matter, and that is the procedure by which the Meech Lake accord is being put into place. There are some very, I should say, extreme things, dramatic statements made about this. It is said that the accord was concluded by first ministers, all men of course, in a secretive way and that the subsequent discussion of other Canadians, including people like yourselves, is quite meaningless because governments have already made up their minds that there cannot be any changes, except, Professor Murray says, if they discover egregious errors. This word "egregious" has, I think, come into the Canadian

constitutional debate from the very large vocabulary of Senator Murray and I think we should kind of return that word to him, and the difficulty with it.

At any rate, it is said it is plain that the accord is being put in place in an arbitrary and even a secretive way. Sometimes, in some of this argument, the present procedure is compared unfavourably with the allegedly more open ways in which the 1982 constitutional amendments were put in place, the amendments that gave us the charter and the new amending formula.

What can we say of this kind of criticism? First, apart from the interim procedure relating to Senate appointments, which I have already mentioned and which I do not like, the governments involved have meticulously adhered to the procedures for constitutional amendment laid down in the Constitution Act, 1982. Unlike the long practice prevailing prior to 1982, the most critical amendments to the Constitution explicitly require the approval of Parliament and all 10 provincial legislatures. Of course, for Meech Lake to come into effect requires unanimous provincial consent rather than the consent of only nine provinces as was obtained in 1981.

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Second, for those Canadians seriously concerned with constitutional matters, the issues dealt with at Meech Lake caused no particular surprise. I remember it was one of the points of the Conservative Party and Mr. Mulroney in the election campaign of 1984, the constitutional accommodation with Quebec, that the government of Quebec made public its general conditions for adhering to Canadian constitutional settlement soon after it came to power. The matter was discussed by the national conventions of both the Liberal Party and the New Democratic Party. There was a period of about five weeks between the original accord in Meech Lake and the signing by the ministers of the Meech Lake agreement or Langevin Block agreement as we are now dealing with it and in this five-week period there was vigorous public discussion and some changes were made.

Now there is some emerging mythology that the way we got the 1982 reforms was more open. On a personal note, I opposed 1982 on procedural grounds and I accept Meech Lake on procedural grounds. That is a rather unusual position.

It is true that the joint committee of the Senate and House of Commons had lengthy hearings about the resolution that had been introduced into Parliament by the Trudeau government and extensive changes were made in the resolution as a result of these hearings. The proceedings of the committee were not very satisfactory. There were very few expert witnesses. The committee itself precluded expert witnesses. I think there were only three; one nominated by each of the parties.

Many important elements of the resolution received almost no discussion in the committee; specifically, the amending formula and the fundamental freedoms clause, the freedom of speech, association and so on. For the most part, the hearings of the committee were monopolized by representatives of interest groups wishing to extend the protection of such groups under the charter.

Yet the resolution as finally forwarded to Westminster and subsequently adopted, was not primarily a product of the committee, but of the agreement concluded between Ottawa and the nine provinces; the 4 a.m. session between McMurtry, Romanow and Chrétien in the little kitchenette up in the east

building. It takes its place in Canadian mythology, kind of like Laura Secord's cow and the last spike. That is where the bargaining was really done and that was where the really final agreement was reached.

Between the conclusion of that agreement and its going to Westminster and being adopted, there was a period of about a month and there was some discussion in the House of Commons and in the Senate, but there was no discussion in any provincial Legislature, no hearing roughly corresponding to the kind of hearing we are having here about Meech Lake.

In general, I do not think the way we got the 1982 reforms, which were much more consequential, was much of a model for participatory democracy.

Third, I want to make the point, and it is a purely political point, not a partisan point, I think the Canadians outside of government are not so powerless as some of the opponents of the accord suppose, in relation to this agreement. Those who signed the agreement are after all, by definition, successful politicians and they all seem fairly urgent about getting their parties re-elected next time around.

The 1981 exercise is, I think, of great significance here. After the conclusion of the November agreement in the conference centre, there was an enormously vigorous mobilization of native groups and more particularly of women's groups. Quite frankly, it seems the politicians were just scared and they made very specific changes in the charter, most importantly new section 28 relating to the equality of men and women under the Constitution. Therefore, I am really saying to the people who now oppose the accord, if they beat up enough of a political dust storm, I am quite sure politicians somewhere will listen to them, particularly in those provinces which have not yet ratified the agreement.

It seems to me the Meech Lake accord is a much less radical break with the Canadian past than most of its opponents claim. So far as the matters that have preoccupied Parliament, the federal government, in the last year, it would not seem to me that the situation would have been much different if Meech Lake had been in effect. Such matters would include reform of the federal tax system, pornography, refugee legislation, free trade, drug patent legislation, now perhaps abortion, capital punishment and so on. I do not think those issues would have been significantly affected if Meech Lake had been on the books.

In general terms, contrary to some of the opponents of the accord, the accord does not strip Ottawa of the power to act decisively in respect to a very wide range of matters important to Canadians as members of a national political community. It is simply not, as Mr. Trudeau asserts, "the fast track to sovereignty-association."

Mr. Chairman: Thank you very much Professor Smiley. For a moment there I was not sure whether you were advocating that the groups should come swarming in the door and beat us up. I take it as a rhetorical device. Thank you very much. There certainly are some views and perhaps perspectives that I think are different from some of the ones we have heard and we will start our questioning.

Mr. Offer: Thank you very much Dr. Smiley. You have touched on and raised a number of issues which I am sure we are going to be canvassing with you in the couple of moments ahead.

The issue that I want to raise with you is the one that you touched upon in your second paragraph. You spoke about the rejection of the accord in terms of "the separatists will almost certainly point to the failure of even the limited changes requested...as proof that any defensible constitutional accommodation between Quebec and English-speaking Canada is impossible."

What I would like to get from you is your sense, not only with respect to the separatist movement but generally the feel and the sense within Quebec as a whole, as to the impact of rejection.

Dr. Smiley: I have no qualifications to speak of that at all. When Mr. Trudeau gave his testimony to the parliamentary committee, he made the statement that there is only a fairly narrow range of the Quebec public that is highly concerned with constitutional matters. I think this is a matter of élites. I do not think the country would break down. I think many of us overestimated the fragility of Canada in the 1960s and 1970s, but I would guess that Mr. Parizeau would have quite an interesting time if this thing should become unravelled. I do not think that will go any further than that. Certainly, I have no qualifications. Ramsay Cook is much more familiar with events in Quebec than I am.

Mr. Offer: I guess the concern that I have is whether--apart from those who are involved in the constitutional possibilities and ramifications; I am not talking about that group specifically--the general public basically looks upon the accord, without looking to the ramifications and the specifications of the accord, as a symbol or some sort of a togetherness. You might want to comment on that.

Dr. Smiley: Yes, that is very interesting. What meaning has the accord? What are the basic political resonances under this accord? What, in a sort of elemental sense, are the differing views of Canada that supporters and opponents of the accord have?

I think many of the opponents of the accord are really talking about a view of Canada in which Ottawa is not one government among 11 or not even one government with a group of responsibilities that are spelled out, but it is the government which, in the crunch, articulates what I think Mr. Trudeau called several years ago, the national will or national purpose. In fact, I think it is the John A. Macdonald view of Canada.

I think some of those of us who are sympathetic to the accord have a much more federalist view of Canada--I do not like to call it decentralist--a pluralist view of Canada, and I think those are the chords that are being rung on that. I think there is partly an engagement here of very different views of what the country has been and probably should become.

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Mr. Allen: I appreciate the fact that we are moving today from a constitutional orientation to a more political orientation. I do not know whether our heads will feel more at home in this atmosphere today than in the past couple of days, but in any case, I certainly appreciate getting into that part of the discussion, not to say, of course, there is not a clear interaction between politics and the fine points of constitution-making.

I wonder whether, first of all, we could go back to some of your initial concerns about the accord. From the perspective of Canadian political science in general, could you articulate a little more what your concern is about the

growth of "executive federalism"--I think you used those words--which appears to be built into the Meech Lake agreement in terms of the requirement of annual constitutional and economic conferences of the first ministers and so on? We have not touched much on that. Could you just give us a little bit of the history of that or the implicit dangers in it?

Dr. Smiley: I cannot speak for any other political scientist but myself. You know, Professor Allen, what academics are like. Certainly, the accord gives a recognition to first ministers' conferences, to executive federalism, if you like, that they have not had before. There is the recognition of first ministers' conferences as an important part of our constitutional process, and then in terms of at least the provisions relating to immigration, a sort of constitutional recognition to a class, at least, of executive agreements that have had no constitutional status; I am not even sure what legal status they have had before.

Now the case is raised, if you put them into the Constitution, who are the first ministers collectively accountable to and so on? That is a difficult one. Are the people in legislatures going to be faced with an increasing number of things where the decisions were really made in Ottawa or by some agreement like this, and the thing is that you are just asked to ratify them and the governments in power say, "Now you cannot change this, because this after all was the process of an intricate process of bargaining and so on"? That to me is a worry. Can you overcome that?

I think things can be done in this process. There was a proposal in the report of the parliamentary committee on Meech Lake for a standing committee of Parliament on constitutional affairs, and I suppose if we have these annual constitutional conferences, that would make sense. Or does it make sense--I do not know--for this Parliament to have a standing committee on constitutional affairs?

One might expect the Premier or the Attorney General or whoever to come before it prior to one of these annual first ministers' meetings and discuss with members of that committee the directions the province would take before he/she got into the bargaining session. I do not know whether that is satisfactory.

Mr. Allen: Yes. One could observe, I suppose, that it is not just in the institutionalization of annual conferences of first ministers that executive federalism is reflected in the accord; you yourself alluded to the way in which the immigration agreements have come about and now have found themselves a place in the accord. There is the interim arrangements with respect to the Senate for its consultation of first ministers, again, in effect, with Ottawa, that generates the Senate appointment process and the Supreme Court situation. So in a sense, written across it is a good deal more of the executive presence, if you like, than meets the eye at first blush. Is that not right?

Dr. Smiley: I think there are two things there. First, you have constitutionalized, you have mandated, I guess, annual first ministers' conferences on the Constitution and on the economy, and then you have, as you say, this process of consultation in respect to members of the Supreme Court and members of the Senate.

As we all know, we have developed this vast, complex process of federal-provincial interaction, and the Constitution has said nothing about it, but this extends it and constitutionalizes it, if you like.

Mr. Allen: You allude to an interesting possibility, that in the process of what would appear to be a kind of executive, high-level centralism, or concentration of power, the process does allow the possibility of some evolution in terms of legislative committee participation in the process of generating proposals for constitutional change and so on. In terms of your sense of the politics of that process, is that something that is apt to be unmanageable ultimately as a process? What are the dangers down the road in that direction if it were to take that turn?

Dr. Smiley: I think this would be a nice question to ask somebody who had been very much involved in this process; that is, somebody who had been a Premier or an Attorney General: "Would your position be just complicated to an intolerable degree if you were not only exposed to people in the other governments but you had to have this intricate process of relating all this to your own Legislature too?" There is that responsibility, and I am quite sure some of them at least might say, "In order to interact with other governments, we have to have a fair degree of freedom of action to negotiate on the spot."

I think there are all kinds of possibilities. In the field of federal-provincial finance that does not involve the Meech Lake agreement, the federal Breau commission a few years ago got the parliamentarians for the first time in history into federal-provincial finance, and I think in a fairly constructive way.

Miss Roberts: If I might, Professor, briefly, it is my understanding that as part of the process we had in 1982 and now with respect to the Meech Lake accord, there has been executive federalism, or whatever you wish to call it, and that we have really enshrined the Supreme Court of Canada as being the final court in the land. Part of their decisions are going to be made on the information that was made available to that executive when they were discussing various things. The judges cannot come up with their particular positions without having some background as to the reasonings and the intentions and what has gone on.

I would like to find out from you, as someone who has been looking at the political scene for a long period of time, has the way the 1982 reform come about hampered the Supreme Court in any way from making appropriate judicial decisions because there are the meetings upstairs? And is it going to be hampered because of the way the Meech Lake accord came about?

1050

Dr. Smiley: I am not sure I am completely with you. It is really a question for a jurist. What kinds of things do courts take into account when they make their decisions and, in the context you are talking about, do they take what the lawyers call legislative history into account? Canadian courts, by and large, have been very restrictive about that, although not uniformly.

I do not know. One can say that the Meech Lake accord confers on the courts some kinds of decisions that they might have to make. I am sure you will hear more about this. What does "distinct society" mean? The courts will have to evolve a definition of that. Somebody might tell you that is not the appropriate kind of political decision for courts to make, though they might get into the notion of shared-cost programs and what are national standards, and so on.

I guess one can say that the Meech Lake accord has the possibilities at

least of extending the range of courts into kinds of decisions that the courts do not now make. One might take the point of view that we have given the courts enough to do with the charter and that conferring new responsibilities is inappropriate and unwise. I am sure that kind of argument will be made some time.

Miss Roberts: My concern is whether there any process, other than the one we have seen in 1982 and 1987, that might give more background for the judges to rely on that you are aware of or that you would suggest?

Dr. Smiley: I am not sure. There is really a good deal of talk now about how we can extend the participation in constitutional decision-making to involve more people than this relatively small number of people who are now involved in it.

I simply do not know. One could have a ratification procedure by popular vote. I suppose that might involve people more. But when I talk to people who are not professionally interested in constitutional matters, even some political scientists, so help me, about Meech Lake, they get a kind of glaze over their eyes. In spite of its potential importance, it is not the kind of thing, at present at least, that engages the attention.

Mr. Chairman: Professor Smiley, Miss Roberts, as a supplementary, I think one of the things we have to grapple with in terms of process, as a legislative committee, is that one of the difficulties we face with what we are doing right now and will be doing for the next few weeks is not so much the way Meech Lake was arrived at, not so much the way the political leaders went through the various steps that they ought to have done in terms of coming to the agreement, but the sense, if not from those who are glazed over but at least from those who do have a keen interest, that somehow there was no discussion, there was no real public debate.

There have been some committees and there will be other committees, but "What can you folks do anyway because the first ministers have already signed it?" I guess one of the things we are grappling with, apart from the accord itself, is whether there are suggestions or recommendations that we can make about the process. It would appear now that provincial legislatures are to be involved in this whole process that they have not been involved in before.

Dr. Smiley: Sure they are. That is right.

Mr. Chairman: What sorts of things might we be looking at in that context that would, in effect, perhaps open it up and make it more possible for some of the groups and individuals who feel they have been left out of the participation process?

Dr. Smiley: I have not got much to say, beyond the point that it would seem constructive to me to have a standing committee of this Legislature on constitutional affairs. It would have hearings prior to these meetings.

Let me take a very tough line on some of these interest groups. They almost were taking the point of view that the people up in Meech Lake had no mandate. I say to myself, by definition, these fellows who got to Meech Lake were not just any group of unselected Canadians. They were people who had been elected. They were successful political leaders.

I think some of the members of some groups--and I am not going to name any because I would get into trouble--who say, "We represent millions of

people out there," are extending themselves a little bit. I am very traditional in saying that--and I am not just trying to be nice to you--in our political system the people who got elected have got some sort of status, as against people who did not get popularly elected.

Therefore, although in a certain narrow sense, I think the premiers may have, I can assume, a particular mandate to do this. These were the people who had run a successful electoral risk. I am convinced and I think you would be that, if there were subsequent great firestorms, somebody would buckle. Somebody may buckle in these provincial governments where the legislators have--but in answer to your very specific question, I cannot think of very much except a standing legislative committee. It could quite possibly meet sometimes outside Toronto and give interested individuals and groups access to it.

Mr. Breaugh: In your submission you gave kind of short shrift to those who have concerns about the shared-cost programs. Is that probably an acknowledgement that it is rare to see any level of government totally fund a program of any kind any more, that almost everything we do is shared by two or more levels of government, that there is a lot of negotiation around standards and things like that?

You are taking the stance that it is basically business as usual, that is now our practice and, in the future, you do not see much change in that. When you stop to think about it, across the country we do everything from building roads to running hospitals and universities and schools and policing and pensions and medicare and social programs. All of those are shared-cost programs. All of them are set to standards which are negotiated--I guess is the best way to do it--and you do not see much change in that.

Dr. Smiley: From our point of view, the Meech Lake agreement does not affect the ones already in place. It does not affect national medicare or hospital insurance, the Canada assistance plan and so on. One might ask, if one gets into a national child care program, would these new provisions really cramp Ottawa's capacity to set national standards? Or one might ask, and one cannot know, that if Meech Lake had been in place in the 1950s and 1960s, would we ever have got a national medicare or hospitalization scheme to which we are all committed in all parties?

I am not really concerned about that. There is a view that simply being on the Ottawa payroll or simply working out of Ottawa, whether you are an MP or a bureaucrat cabinet minister, somehow gives you a wider perspective superior to somebody working in Queen's Park--

Mr. Breaugh: The worldwide vision.

Dr. Smiley: --or Quebec City or Charlottetown, but I have been in Ottawa too much to believe that.

But when the first of the shared-cost programs started in the years immediately after the war, the provinces were administratively, at least, pretty primitive organizations. For example, provincial departments of health in 1945 were pretty primitive organizations without much highly developed expertise. I think we are past that now.

1100

Mr. Breaugh: Just to pursue that a bit, on the other side of the

coin, I would have some difficulty arguing that the federal government, unless it is also going to deliver the program, would have some difficulty setting a common standard across Canada. I have problems with the idea that it would set standards, for example, that would be exactly the same in terms of what kind of a house you would build in southern Ontario, as opposed to the kind of house you would build in northern Labrador. There are obvious differences that have to be accommodated and if you had one common set of standards that applied uniformly across the country in a very rigid way, you would be into something very nonsensical in a hurry.

Dr. Smiley: What about the more general standards one has relating to the Canada Health Act, uniform accessibility and so on? I suppose one could think of day care standards in terms--I am not sure what they would be--of the uniform standards of accessibility. I would agree that uniform standards of that rigid nature--at least I have read this and I have been convinced of this. In the United States one of the difficulties in dealing with the urban problems is that there have been very specific decisions coming out of Washington that try to find cities under very different circumstances.

Mr. Allen: May I have a supplementary on that?

Mr. Chairman: OK, a supplementary, then Mr. Cordiano and Mr. Eves.

Mr. Allen: The first part of the supplementary, Professor Smiley, has to do with the question of where this whole concern came from and how it got into Meech Lake in the first place. Of course, it comes out of the politics, does it not, the jurisdictional problems of the country, where you have had massive taxing power at the federal level and capacities to spend, but not jurisdiction to spend in, and the provinces have had the obverse problem.

However one went about defining in words, in constitutional terms, one would always be going back and forth between those two elements of our jurisdictional problem. Whatever language one used, one would probably politically come out at the same end point. Would that be reasonable in terms of what is done in the country?

Dr. Smiley: No. I think there are alternative end points. One might say one could overcome the problem of Ottawa having more financial resources by a system of unconditional financial transfers. From the federal point of view, a member of Parliament might say, "It is not responsible for us to be ladling out all these billions of dollars that we extract from Canadians to the provinces without any control over what the provinces do."

I think there are many end points that you could have all the way from an almost exclusive reliance on unconditional transfers to what in the American system seems to be almost exclusive reliance on very specific programs with very detailed conditions.

Mr. Allen: Professor Hogg said that, as far as he could see, the only clear thing one could say as a result of the phrasing in Meech Lake was that you could not take the money and run and spend it on something totally different. You could not take it for education and spend it on roads. The objective in sight had to be education. But beyond that, it was very difficult to say.

Would that be your opinion, or would you think that objectives really do entail more than that in terms of setting of terms of reference, conditions

and so on, as you have outlined, for example, with regard to the Canada Health Act?

Dr. Smiley: This to me is almost unanswerable because you are introducing--I suppose in the last analysis the courts would have to make this judgement. I do not know what evidence they would rely upon. I think one of the difficulties with this new section 106A may be that you inject the courts into the executive federalism process from which they have been absent before, in which judicial--they have not much to go on in terms of law or whatever--in which they would not really be very useful. One of the interesting things in this whole world of fiscal and executive federalism is that the judiciary really has not been involved in it very much, and some people say that is a good thing.

Mr. Chairman: Mr. Cordiano and then Mr. Eves.

Mr. Cordiano: I am going to follow up on some of the questions that Mr. Breaugh and Mr. Allen have been touching on in the area of shared-cost programs. I understand what you are saying with respect to your having more faith than the critics of section 40 under the amendment act, in that you do not have as much faith in Ottawa as some people do in terms of setting national objectives. That is what you have been saying, and I understand that.

On the other hand, it is conceivable to me, through discussing this with some of the expert witnesses we have had on constitutional law, that one thing Meech Lake does is explicitly recognize federal spending power in areas of provincial jurisdiction. So in a sense, it has increased the federal power by explicitly recognizing it in the Constitution for the very first time. Would you not agree that it does that and goes a little bit further?

Dr. Smiley: These are really legal questions. The Constitution now does not explicitly recognize Ottawa's power to spend and to set conditions. There are two cases somewhere in the system now which are challenging Ottawa's power. There is a very powerful argument against this section on shared-cost programs from a Quebec constitutional lawyer, Andr  e Lajoie, who is a nationalist and who says this should be unacceptable to Quebec.

However, I think many constitutional scholars--and I should say that even though it is not constitutionally recognized, there is so much practice behind it that it really is part of the Constitution.

Mr. Cordiano: The recognition of something that has happened over many years has developed as a result of agreements and arrangements.

Dr. Smiley: The courts do very much involve themselves in the spending power. These are judicious people. They would upset an awful lot of applecarts I think, and interests, if they radically challenged the spending power. I doubt if they would do that.

Mr. Eves: Professor Smiley, I just wanted to touch on a point with respect to interest groups, on page 5 of your submission. You indicated here today when you were talking to us that you have no doubt that if there are changes required in the accord, interest groups will put enough pressure on government that they will be done.

Indeed, if such changes were needed, would it not be good common sense to amend the Meech Lake accord prior to final approval as opposed to after? Especially with the Premier of New Brunswick hanging out there on a limb, so

to speak, not having made up his mind yet and paying attention to these interest groups, as indeed I think he should.

If we, as a committee, and other legislatures, for example, New Brunswick, decide that some of these groups or one of these groups or a few of them have some valid concerns and some changes are needed, would it not make sense to make them before as opposed to after?

Dr. Smiley: The general answer is no, but I am a little bit--I think this is a good agreement and I think it is a fragile agreement. I am afraid it will become unravelled. In other words, the government of Quebec has accepted this, the Legislature of Quebec has accepted this. The position of some groups--I think this coalition group on the Constitution said, "We want an agreement very badly but we do not want this one."

My own judgement, and I may be quite wrong, is that there is not very much room to manoeuvre, that this agreement pretty much reflects what is acceptable to the various governments. It is a complex agreement, and I think that if it is changed, it is starting down a process where the whole thing might become unravelled. But I might be quite wrong on that.

I understand the frustration of committees like this and of interest groups, but it does seem to me that the alternatives may well be something very much like this or no constitutional accommodation at all.

1110

Mr. Eves: Just a comment: I think Quebec perhaps is the only jurisdiction in Canada that, in my opinion, has done this properly or appropriately. It held its public hearings and heard from the public and received public input before it decided to sign on the dotted line, unlike Ontario and others.

Dr. Smiley: I suppose you can say that. Provincially, I think Quebec governments in the last couple of decades have involved their people in the constitutional process in a way that people in other provinces have not. Again, one would have to throw this one up to an experienced person. Would executive federalism be possible if premiers, attorneys general, ministers of health and so on had not only to negotiate with their counterparts from other governments, but also were under very direct and specific influences from their own legislatures. I still do not know the answer to that.

My biases are all in favour of legislatures. I was just delighted about what happened in the United Kingdom in the last couple of weeks when a very large number of Conservative MPs rejected a three-line whip on this security legislation. British MPs are a very independent group, but the British do not have to wrestle with executive federalism. The Prime Minister has the power to abolish local governments if she does not like the political complexion of them. Canadian prime ministers do not have that.

Mr. Chairman: Professor Smiley, I think Mr. Allen noted earlier that this morning we entered into a world that maybe we are somewhat more comfortable with, that of political science, dare I say, than for what is to come, history. Your comments and frankness are much appreciated. We thank you for joining us this morning.

I call on our second witness this morning, Professor Ramsay Cook of York University. You have received a copy, exhibit 20, of Professor Cook's text. We

have some extra copies if, inadvertently, any one of us has left his copy at home and the clerk can pass them out.

Professor Cook, we are delighted you could join us as well this morning. I was wondering whether at the beginning I would have to declare a conflict of interest, having submitted to you over the years a good number of papers both as an undergraduate and a graduate student. I am always reminded of the compassion you showed when you handed those back. Perhaps students always dream of the day when ultimately one of their professors will finally be presenting a document where the student then is able to peruse it and ask questions.

I am sure that in the next hour or so we will be able to go through this with you. I might add, for members of the committee, that Professor Cook has had a very long history dealing with Quebec, dealing with relations between French and English Canadians, and I think this whole perspective and that background will be of interest to us as we meet with him this morning. Without further comment, I will let you proceed as you would like.

RAMSAY COOK

Mr. Cook: I have given you all your grades, so I do not think there is any conflict of interest. You can treat me as rudely as you like or as rudely as my colleague, Professor Allen, used to do when he reviewed my books.

I thank all the members of the committee for giving me some of your time. I have sent you a rather long brief. I hope you have been able to read some of it. It is not my intention to go over it with you in any detail, but to say a few things surrounding it and then to enter into the process which has always been the most interesting one for me anyway, and that is discussion.

I want to say one or two things which are not in my brief. I hope that is acceptable to you. Of course, they are matters about which I would be glad to try to answer questions as well.

I want to begin by associating myself with my colleague, Professor Hogg, and I think some other of the witnesses before this committee, at least as I read Professor Hogg in the paper, in saying, as I am sure many of you agree, that I think the process by which we have arrived at this particular agreement--I do not think the processes we had before this agreement were perfect either--is not a satisfactory one. I think that for 11 premiers and one Prime Minister to meet twice in camera and come out with an agreement of this sort and to represent it to the Canadian people as a fait accompli is simply not a good way to arrive at a constitutional decision, because these are matters which deal with the very fabric of Canadian life.

I do not mean by this that they should have met under cameras all the time either. I know some of these meetings must take place in camera, but I think an agreement was arrived at for which few, if any, of those leaders had a mandate.

It is not that part of the process that worries me alone, however. It is the part of the process we have become engaged in subsequently and I think Mr. Eves' question was directed to this with the last witness. Once the agreement was arrived at, we had a lengthy parliamentary committee in Ottawa, but the committee began by being told that no changes could be made. I think it was

rather frustrating for people who felt there were some changes that could be made to make this a better agreement.

Egregious errors were said to be correctable, but the person who they were was the person who was the one who would judge what was egregious and what was not, which did not seem to me to be exactly a fair game. I have to say that I regret that I read in the Globe and Mail on January 26 that the Premier (Mr. Peterson) of this province has adopted exactly the same view, that you people can sit and listen to us people, but in the end the agreement will stand as it us. I think that is unfortunate. I think this is not a good way to make what seem to me to be fundamental and in some cases radical alterations in the constitutional structure of Canada.

I think it is especially regrettable if it is to be a precedent for that section of the Meech Lake accord which calls for an annual meeting of the Prime Minister and premiers on the Constitution. It seems to me that proposal, in itself, is a difficult one, but if it is also to be conducted in this manner, we have what Professor Smiley called "executive federalism" absolutely run wild, with the roles of parliaments and legislatures reduced to a level which is really quite extraordinary, and I believe, unacceptable.

That annual constitutional meeting is going to be the kind of meeting in which virtually every subject one can imagine in this country will become an issue to be put forward as a constitutional matter. Here I want to associate myself with both John Whyte, professor of constitutional law at Queen's University and President Harry Arthurs, the president of my own university, both of whom have expressed great reservations about the possibilities of executive federalism, as it is called, arising to that level.

It is already true that under our Constitution, the legislatures and the Parliament of Canada are limited in quite important ways by the Constitution itself. Increasingly, they are limited by the decisions of the Supreme Court, as we know from the Morgentaler decision last week. It seems to me that there is now the possibility that they will be further limited if the sort of precedent that was set by the Meech Lake agreement is allowed to be continued into constitutional decisions in the future.

1120

I suppose I would be less unhappy about this procedure if I was of the opinion that the Meech Lake-Langevin Block accord was a perfect one or even a good one. It seems to me there are some serious errors in it which would prevent me from describing it as perfect and perhaps even from describing it as good.

My colleague with whom I associated myself, Professor Peter Hogg, in his recent annotated version of the Meech Lake agreement says--"I suppose this is why he is strongly in favour of it--?" "For the first time in Canadian history, an answer has been provided to the question, 'What does Quebec want?' That simply is not true. As a historian, I want to state to you categorically that it is not true. Indeed, on Professor Hogg's own showing, the Confederation arrangement of 1867 answered the question, 'What does Quebec want?'"

Professor Hogg himself argues that the Canadian federal system was the consequence of Quebec's demands. He then goes on to suggest that there were a certain number of others. It seems to me that in the 120 years since

Confederation, what Quebec wanted has frequently been listened to and agreed to.

It is true that we had a series of requests from the new Quebec government that have been answered in the Meech Lake constitutional accord, although as I think you will see in my paper, what Quebec asked for both in the Liberal Party's program and in the initial statement of Mr. Rémiillard, was in one important case at least less than the Meech Lake agreement agreed to, in that the Quebec government asked that the concept of "distinct society" be placed in a preamble to the Constitution and it has in fact turned out to be an interpretative clause. Since this agreement was reached in an in camera conference, we have no real idea why that quite significant change, I believe, took place.

I think there are other problems in this agreement. You have probably heard of them from other witnesses. I think this agreement has made constitutional reform, especially as it relates to the Senate, more difficult than previously. It has made the admission of new provinces more difficult than previously. It made no progress in the important area of aboriginal rights. It is vague on the subject of what the limitations on the spending power are. I happen to be in favour of a limitation on the federal spending power, but I would like to have an answer to the important question of who will decide if a program or initiative is compatible with national objectives. Will it be the federal government? Will it be a federal court? Will it be, as Mr. McKenna suggested before becoming Premier, a conference of federal-provincial ministers? It seems to me that is a very important question.

As I have said in the brief I presented to you, my principal concern is about the vagueness of the concept "distinct society." It is not that I have ever doubted that Quebec is a society which is different from others in many important respects. Nor is it that I have ever doubted that the Canadian Constitution, beginning in 1967, recognized that fact. I outlined in my paper some, if not all of the ways that this was so. Nor do I doubt that Quebec remains in some important respects a different society.

It is not, therefore, the idea that Quebec is a distinct society that I object to, but the failure of the leaders of this country to specify more explicitly what precisely is meant by that term. It seems to me that a matter of such fundamental significance to the country is a matter for politicians to decide upon and not for judges to decide upon. I think what judges will decide about the meaning of this term is utterly unpredictable. Once again, I refer you to the decision last week in the Morgentaler case.

We may recall what the Minister of Justice said at the time of the passage of the Charter of Rights about the implications of section 7 of the charter. He said it would not lead to the overturning of the abortion law when in fact last week it did precisely that. What ministers of government say about what courts will decide is of no more significance than what I say, and I think that is rather limited.

Professor Hogg, in his commentary on the accord, begins with the statement, ?? "It is not easy to define the characteristics that make Quebec distinct." That I agree to. He then goes on to say, however, ?? "In addition to language and law"--which we know are distinct aspects of Quebec society--"Quebec's distinctiveness finds expression in a host of public and private institutions that are unlike their equivalents in other provinces."

I think it would be helpful to the rest of us if some of those

institutions were named by those who support the accord and if it was explained why those institutions require some special constitutional protection. I think that kind of general explanation will only lead to another long debate, both another long political debate and a long legislative debate, about what the meaning of this term is.

Professor Hogg, and I believe the supporters of the Meech Lake accord in most parts of English-speaking Canada, believe that the term is what Professor Hogg calls symbolic or hortatory. If you read the speech of Premier Bourassa that I quote in my paper, you will discover that Premier Bourassa has a rather different view. He says it consolidates the powers Quebec already has and will permit Quebec to gain new ground.

If you read most of the commentary on this subject of the Meech Lake accord in the province of Quebec, you will see that the debate turns on the question of whether or not it should be clearly defined, thus to give Quebec increased powers, or whether it should be left undefined so that Quebec can gain increased powers through court decisions.

My point is that I think it is dangerous to leave a section of the Constitution as vague as this because it will lead to misunderstanding. I think it will lead to a return to the kinds of debates about vague phrases that we had in the 1960s. It seems to me we need a clear definition of the meaning of this term.

We are, for example, given a variety of different views as to the impact of the "distinct society" clause on the application of the Canadian Charter of Rights and Freedoms, not just on equality rights for women, although that is very significant and has been spoken of a good deal, but potentially on other areas of the charter as well that in my view could lead to the qualities of citizenship in Canada being different in different parts of the country, which seems to me to be unacceptable.

Even though you have already in effect been told so by the Premier, I would urge this committee to take the view that this is not a final accord, that there is the possibility of reopening, discussing and attempting to clarify some of those matters which have as yet not been made clear enough. I think this committee should urge the present Premier of the province to continue the role that his predecessors, Mr. Robarts and Mr. Davis, took in adopting a national view of the responsibilities of Ontario in the matter of the Constitution.

I do not see why it cannot be changed. Mr. McKenna, before he became Premier of the province of New Brunswick, pointed out to the parliamentary committee last summer in Ottawa that the 1981 parliamentary committee brought in some 65 amendments, including guarantees for the protection of the rights of the mentally and physically disabled and amendments offering aboriginal rights.

It seems to me, therefore, that this constitutional accord could be reopened and that some of those areas which are of serious concern to various groups in the country could once again be discussed. I am not urging you to urge that the Meech Lake accord be rejected. I am simply urging you to take the view that it is still possible, in a country where rational discussion about the Constitution is almost a national sport, to continue to play the game and to try to get a better agreement than the one we have.

Mr. Breaugh: I want to pursue something you spoke of in your remarks today. If I look at this accord, I do not find it distasteful, to put it as nicely as I can. When I think about what might happen because of the words that are used, because of the vagueness that is in parts of it, that is when I begin to get concerned.

The larger concern I have and one that I think we are somehow going to have to deal with is that in this country we have always used a British parliamentary model for government. We have not had much of a history of establishing public policy by means of litigation as the Americans do. Much of what I dislike about the American system, frankly, is simply that. The distinctions between levels of government are very clear and rather rigid, and the ability of everybody under the sun, by means of litigation, to really thwart public policy is regularly used.

1130

Can you give us some kind of assessment of how far down that road we will be going with this kind of accord? I am a fan of the American system. I think it has many virtues, but its greatest single fault is the ability of anybody out there to get a lawyer, go to court and argue that his constitutional rights are being violated, so that the whole world has to stop until the court decides. Are we going down that road with this accord?

Mr. Cook: I think, sir, the Canadian situation has always been one where, since it has a Constitution and a division of powers in which courts have played an important role, it is not a unitary state, nor could it be. As we know very well from the earliest decisions of the judicial committee of the Privy Council in the 1870s and 1890s, which led to a fairly high degree of decentralization, the Canadian Constitution--you know all this, let me not give you the first-year lecture, you know it better than I do--the courts have always played a very significant role.

I think, with the introduction of the Charter of Rights, it is obvious that the courts have been given an increased role and, on the whole, I am a supporter of the Charter of Rights. I think it is a good document, although some parts of it perhaps are as vague as some of the things that I have been criticizing this morning.

My answer to your question is, yes, I think we are moving considerably in that direction, and not to repeat what I said before but I think the Morgentaler decision is a clear example of the willingness now, or the sense that the Supreme Court judges feel a responsibility to make decisions which are on rather broad grounds. I think we have now decided, some of our politician leaders have decided, if they cannot solve a problem, to give it to the courts and let them solve it.

I think we are moving in that direction and I think this accord takes us further in that direction, particularly, with respect to the matter of distinct society, because, given the fact that it is so undefined, it seems to me that in all the areas in which, over the course of the last 20 years, the government of Quebec has been anxious to increase its authority, it will now use that clause in an attempt to argue that its distinctness necessitates that it have powers in certain new areas.

Claude Morin, the former Minister of Intergovernmental Affairs, in an interview he gave on CBC's Sunday Morning, on May 31 last year, said precisely that. If he were again to be Minister of Intergovernmental Affairs in the

government of Quebec, here is an area of vagueness that could persistently be used to attempt to argue for an increasing area of authority.

I think this very fundamental question and its impact upon the Charter of Rights--and I think it is an open question what that impact is, because there are differences of opinion among legal scholars--are the questions that the court will now be asked to decide. To recapitulate, I think in a federal system it is inevitable that the courts make certain decisions. I do not think it is inevitable or necessary that they be given all of these large decisions.

Mr. Breaugh: I think for those who accept the accord as is, part of the reason they can do that is that it has never been critical before that there be precise definitions and agreements of this kind, because nobody could go off to court where a court would rule. But it now raises the very distinct possibility that, if you lose the political argument, which has normally been our decision-making process, if someone does not like the interpretation that the provinces put on national standards for a particular program, they may now be able to litigate that. In other words, they could lose the political argument but they have a second, more powerful recourse of going to court and really putting a stymie to the political process as we know it.

The hesitation and the apprehension that I have around this accord is that in the parliamentary context I know, this is not dangerous. But I am a little bit concerned that we may be going into a parliamentary process that none of us is familiar with, and perhaps the precise definition of words that are used in this accord may come back to haunt us. We are comfortable with that language as Canadian politicians, because that is traditionally the way we have resolved these disputes. But if there is another shoe going to be dropped on us a year or so from now, we probably should learn about that now.

Mr. Cook: I could not agree with you more. I think, if you look at the discussion even in Quebec, but also across the country, what it is that the government of Quebec is being given the role to preserve and promote, what precisely is it? Professor Hogg argues in his book that, since the Legislature of Quebec is also given the power to preserve the duality of Canada, the term "distinct society" covers both English and French in Quebec, but that is far from clear in the debate that has taken place in Quebec.

I quoted in my paper to you Premier Bourassa's statement in which he said "we have for the first time" been given the power to promote the "French character of Quebec." So there is not even an agreement, in my view, among the people who put this accord together, about whether Quebec's distinctiveness is simply its French-speaking majority or whether it is its French-speaking majority and English-speaking minority.

Indeed, a leading constitutional lawyer in Quebec whom I quote in my paper said that clause 2 covers French, English, aboriginal peoples and multiculturalism as well. In fact, it says nothing whatsoever about multiculturalism or native peoples, although later on in the agreement there is a reference to that.

While I am on this subject, it seems to me that it is really unfortunate that in this other aspect of clause 2, in which the fundamental character of Canada is described as being French and English, that the fundamental characteristics of Canada, the legislatures and the Parliament of Canada only are given the role of preserving fundamental--not promoting but only preserving, and governments are given no role.

Were I a Franco-Ontarian, I would be deeply distressed by the fact that

my part of the Canadian duality was not something that the government of Ontario was given the power to promote as well as to preserve. If I were a Franco-Albertan, where I cannot even ask a question in the Legislature in French, I would be outraged. In fact I am.

Mr. Cordiano: I want to add a supplementary. I understand what you are saying, Mr. Cook, this vagueness, the whole question of what it is that you mean by a phrase like "distinct society." However, the difficulty I have is that there are other terms and other concepts which are all over the place in our Constitution. In fact, we are introduced in the Constitutional amendment passed in 1982 to such as terms as "fundamental justice," "free and democratic society." These are all terms that are rather vague and left to the courts to interpret in the best of times. I think those are concepts that have been introduced in the past.

The difficulty I have is that we have always dealt with vague terms and phrases that have been put in constitutions and then left somehow to the courts to decide. Those things may become unravelled over time but, certainly, we have always gone through an appellate type of system to determine when there are conflicts, when there are controversies.

Mr. Cook: I agree and I do not think it will ever be possible to have a Constitution in which everything is so absolutely precise that all of us will agree about its entire meaning. It does not follow from that, just because we have imprecisions in the past, that we should have more imprecisions now. My own upbringing in these matters of the Constitution is to say that the most vague phrases were "peace, order and good government" and "property and civil rights." We know the consequence of that was, through the decisions of the courts, that when the Depression came in 1938 the federal government was largely emasculated of any power to deal with the problems that existed.

That does not seem to me to be an argument in favour of not trying now to bring more precision into these particular clauses. I think it is impossible ever to be absolutely precise but I think that precision is always preferable to imprecision wherever it is possible. Frankly, I do not think of it as impossible in this case at least to move in the direction of some greater precision.

When I read, as I have read, both the debates in Quebec on the subject of distinct society and the commentaries of my academic colleagues, I have come to the conclusion that the principal preoccupation is with the matter of language. It would seem to me at least possible to argue that if some greater guarantee were given to the government of Quebec about the matter of its control over language, there might be a willingness on the part of that government to go back to the position it originally adopted, which was to put the "distinct society" clause in the preamble, and not as an interpretative clause.

1140

I think, in a sense, what Quebec is asking for in the matter of language is to be a province like the others, that is to say, to be able to control its language policy. That seems to me to be, within certain kinds of limits, a perfectly reasonable demand. But then after that, I think we have to say: "Well, what else does 'distinct society' mean? If you people are using the term, please tell us what it means." It is an ideology, it is not a reality. That is what the problem is.

Mr. Cordiano: Sure, but I go back to what I was saying, that we always have to refer by some other means to defining exactly what this term means. For example, we have had discussions over the past number of years about what exactly what multiculturalism means. It may mean one thing to you and another thing to me. It is a very vague concept, and it is still evolving as to what exactly it means in this country.

We can sit here and argue until we are blue in the face about what exactly it means. It may mean one thing to me and, certainly, I have very precise ways in which I define that term. But I may come to you--and I hear the word "multiculturalism" used in all kinds of contexts which seem improper to me. People do use that term in many different ways, and it is in our Constitution.

Mr. Cook: Yes, but, Mr. Cordiano, I beg to point out to you, with all respect, it is in our Constitution, it is there, but no government, provincial or federal, is given the responsibility to preserve and promote it. What is says in the Constitution is that the Charter of Rights will be preserved and enhanced in the light of multicultural rights. It is an interpretative clause.

Mr. Cordiano: Right.

Mr. Cook: "Distinct society" is an interpretative clause, but "distinct society" is also what a government of Canada, namely the government of Quebec, is given the power to preserve and promote. With all due respect, I think that is very, very different.

Mr. Offer: I have a supplementary on that point. I do not want to oversimplify, but you have indicated that your concern is that a precision in the definition of "distinct society" is not there for those to determine whether they are in favour or against the accord in terms of its ramifications.

I question whether your way in which that would be cured is, in fact, a realistic way. Indeed, the definition of "distinct society" seems to be being referred somewhere for some sort of a definition, but does it not in many ways rather take it definitional qualities from a particular context of a question posed before a particular issue and how that phrase would be interpreted in the light of a particular issue?

If that is the case, even taking for the moment your concern, how could we even rely upon a naked definition of "distinct society" in terms of how that particular phrase will be used with issues in the future? How would even your particular proposal help in any way?

Mr. Cook: If I understand your question rightly, sir, it seems to me that it would be answered in this way. If the precise meaning of distinct society was once set down, it would be reasonably clear from that what powers, if any, were attached to it.

In 1867, Quebec was declared to be a province, and the Constitution of Canada set down the powers of that province. In 1986, Quebec was declared to be a distinct society. I am asking to know what the implications of being a distinct society are that are not already there when you are declared to be a province. In terms of the Constitution, what is the difference between being a province and being a distinct society? That is really the question I am asking.

If being a distinct society requires that you be allowed to appoint

diplomatic representatives abroad, let us hear it. If distinct society means that you be allowed to have your own manpower retraining policies, let us hear it, as we have heard in this constitutional accord that Quebec needs some special powers in the field of immigration. It has been defined in immigration, it has been defined in language, it has been defined in law. I am simply asking, what else? Is it absolutely open-ended or is it, as Professor Hogg says, meaningless?

Mr. Offer: I guess my question to you in response is, if, as you have already admitted, it is merely an interpretative provision, is it not proper to accept that, being an interpretative provision, it ought to be interpreted in accordance with a particular issue which is brought before the court, which would of necessity exclude a naked definition at this point in time?

Mr. Cook: I am sorry if I misunderstood your question the first time, and I did. My proposal is that it not be an interpretative clause. My proposal is that it be removed and placed in the preamble of the Constitution and we could put everything else in the preamble too, the multicultural nature and all of these things. We can eventually have a constitutional prologue that is as long as that of the Indian Constitution.

But remove it as an interpretative clause, put it in the preamble and set out specifically what the Quebec's distinction is and what powers follow from that. That is really what was done in 1867. Quebec said it had a different legal system, and the Constitution of 1867 says in matters of the common law that Quebec is different. It was agreed that Quebec had a different population makeup, so that certain language provisions were applied to Quebec.

I think that was a very good way of going about it. I think we have moved away from that. We have moved to the position of saying: "Well, here is this wonderful phrase, 'distinct society.' It is, as our legal scholars say, very hard to define. Let us let the judges tell us what it means."

Mr. Offer: But I imagine the concern is that if it were not moved into the preamble, would your reservation still hold if it remained as an interpretative provision?

Mr. Cook: I think that I would be prepared to argue that any step in the direction of greater precision would make me happier than I am now.

Mr. Offer: Keeping in mind that if we move the "distinct society" clause to the preamble, we might be inviting the same type of criticism that, for instance, the aboriginal peoples have indicated, that it was mere window-dressing.

Mr. Cook: Professor Hogg tells us it is window-dressing. He says it is hortatory and symbolic.

Mr. Offer: I would rather deal with your concern.

Mr. Cook: My view is that we do not know what it is.

Mr. Offer: OK.

Mr. Cook: OK? And that is what is wrong with it.

Mr. Allen: It is a pleasure to have Professor Cook with us this

morning and not to be engaging in a reviewing capacity this morning, but to be engaging in some discussion.

First of all, partly for my own benefit and partly for the committee as a whole, I would like to know what the really substantial difference is in your view between having interpretative clauses and having preambles. My sense of what preambles tend to do is to set an overall direction for the document. In that sense, they are broadly a compilation of interpretative phrases, if you like. What substantially is the difference between putting something in a preamble and putting it in interpretative clauses in the body of the act?

Mr. Cook: I think you would probably have been better off to have asked that of Professor Hogg. I am not, as you know perfectly well, an expert in legal and constitutional matters of that technical kind. My understanding of this, having discussed it with some people who are knowledgeable, is simply that a preamble is essentially descriptive and that an interpretative clause mandates the court to say that when you are making a decision, you must take this into account.

Existing in the substantive part of the Constitution makes it mandatory for the court to take this into account. It is very specific, whereas my understanding of a preamble is that it is purely descriptive. It is not that it is ignored, but it is purely descriptive. It seems to be absolutely clear that the understanding of the Quebec government in this matter is as I have presented it. If you read the Premier of Quebec's statement that I quoted, he says and he underlines and he repeats that with this clause as an interpretative clause, the whole of the Canadian Constitution and the Charter of Rights must be interpreted in the light of the clause.

I think that it is a difference that is certainly believed to represent a significant difference by those people in Quebec who adhere to this agreement. I frankly believe that the fact that it had moved in the Quebec requests from a request that it be put in the preamble to transforming it into a statement about interpretation was precisely because the Quebec government believes that this is what increases its authority, that by that very move its authority over language matters is substantially increased.

1150

Mr. Allen: So you are suggesting that the first effect of putting it in the preamble would be to weaken the concept and weaken the impact of the phrasing with respect to the freight that "distinct society" would carry in the Constitution as a whole? That would weaken it.

Mr. Cook: Yes sir.

Mr. Allen: Is your concern fairly heavily influenced by the phrasing of the clause also in the way in which other governments are given only the right or the power to preserve the qualities described in the "distinct society" section, and therefore only the province of Quebec is given the power to promote with respect to the distinctiveness of Quebec? Your belief is that should also be a power of the federal government to not only preserve but also to promote that fact?

Is your concern also that, with respect to the rest of the country and the characteristics, the dualism that is described there, there is only the power to preserve and not to promote? How much of your concern resides in those separations of degrees of power, if you like, in that phrasing?

Mr. Cook: I think that is both related and a separate issue. My view is that the failure to provide parallel language is regrettable. While I understand the difficulties of provincial politicians in promoting the rights of their francophone citizens, thank goodness I live in a province where the record is very good, I nevertheless think it is regrettable that at the very least the federal government's powers are not defined in promoting what the Constitution now says is "fundamental."

That is a very strong word. Yet the federal government's authority is not specified. It has no role. It is simply that the Parliament of Canada has the role. It seems to me that "preserved and promoted" should be parallel phraseology, both with respect to "distinct society," if we are going to have that, and with the matters of "fundamental characteristics."

It seems to me also, to come back to this matter of judicial interpretation, the question that does arise is, if "fundamental characteristic" and "distinct society" appear to be in conflict, which takes precedence? If in the promotion of its fundamental characteristics the government of Quebec, to take that example for the moment, decides that it has in some way to limit the rights of the English-language minority in Quebec, and the English-language minority says, "But this is a fundamental characteristic of Canada that we represent," which of those two words, each of which is rather vague, takes precedence? I suppose the court will have to decide.

My preference would be for the view that the fundamental characteristics of Canada took preference over the distinct societies that exist, which we used to call provinces, because every province of Canada is a distinct society in my view.

Mr. Allen: Could I ask you, since you have asked for more precision in the phrasing, whether it goes in an interpretive clause or whether it goes in the preamble, how would you go about setting out the characteristic that should be labelled as distinct? I think you are probably as in good a position as anybody that I know of outside Quebec to do that. How would you construct that phrasing?

Mr. Cook: As I said a moment ago, it is already perfectly clear that Quebec has a different civil law system. That is already recognized. It is already clear to everybody that the majority of Quebecers speak the French language, so that those things seem perfectly clear to me. But when one goes beyond that, I think I at least would need quite a lot of additional guidance. What we know about the history of Quebec in the course of the last 30 years is that as it has become a modern, urban, industrial society and one which is much more secular than it once was, its distinctiveness from the rest of us who live in North America is not self-evident. It was once said that Quebec was French-speaking, Catholic and rural. It is not French-speaking, Catholic and rural any longer. It is French-speaking, but it is urban and it is secular.

It seems to me the difficulty is precisely in that what it is that makes Quebec so distinct is less clear than it ever was in the past. That is why it seems to me important that those things be made specific. I, frankly, cannot go beyond what I have just said to you. Of course, there are some different institutions: there are caisses populaires and there are credit unions; there are the Expos and there are the Blue Jays; there are the national trade unions, the Quebec Federation of Labour, and the Ontario Federation of Labour. There are certain other things that are conducted in a different manner in Quebec. There is no doubt about that.

It is also true of some other provinces, but does that require some explicit definition in the Constitution? What is it that is going to be in that distinct society that is going to be defended when some lawyer goes to court and says, "The Quebec government's request, demand"--what shall I say? Mr. Parizeau set out a whole list of them last week--"for autonomy in the field of manpower retraining policies...the Quebec labour force is different from the rest of the provinces. We are going to have to operate in that area"?

Or let us say that a Quebec government comes to power that goes back to the position the Daniel Johnson government had in 1968, which said: "The Canada Council and the Social Sciences and Humanities Research Council is engaged in activities that are essentially educational and provincial. We would like those agencies not to act in the province of Quebec but that instead Quebec be given direct financial compensation." Is that part of what a distinct society is?

As I say in my paper, if the Canada Council gives a grant to a Quebec scholar to study Quebec literature, is that preserving or promoting, or both, or neither? That is the sort of vagueness that worries me. When one simply talks about a host of institutions, it is an open invitation to take each one of those institutions and try to defend that as part of the definition.

Mr. Allen: I suppose one might observe that if Professor Hogg is right, that it is a relatively limited, in fact, an extremely limited vehicle for anything. It does not make a great deal of difference what Mr. Bourassa says it means for political purposes in Quebec when he brings home the bacon, so called, but when you fry it out in the pan, there is not much meat left. Why then are we worried?

Mr. Cook: But Mr. Bourassa comes home and says, "Dear me, I told you the 'distinct society' clause included an extension of our powers and the Supreme Court says it does not. We have been hoodwinked again, have we not?" That is what he says, and Mr. Parizeau says: "Right. Just as I told you so."

Mr. Allen: I do not want to monopolize the floor, but I have another line of questioning about spending powers and some more general questions there. Do you want to break and come back, Mr. Chairman?

Mr. Chairman: Mr. Eves.

Mr. Eves: Professor Cook, you have indicated you are concerned about the method of arriving at the constitutional amendment. You heard the question I asked of our previous witness, Professor Smiley. How would you respond to the same question: if amendments are needed and we or other legislatures or legislative bodies or committees of the same decide that something could be clarified by way of amendment, would it not make common sense to do it before the final draft is ratified?

Mr. Cook: It makes perfect common sense to me, Mr. Eves. I see no reason why it cannot be tried again. I see no reason for another observation you made when you originally asked the question. We now have one provincial Premier in this country who is, in fact, not committed to it, who is, I expect, going to make some requests. It may be necessary to talk to him. So I do not see why the process should end.

In 1956, 1965, 1971 and 1982, the government of Quebec rejected agreements that had been reached by the other provinces in matters of constitutional amendment. It was not the end of the world. They went back to work and tried to produce yet another agreement.

Mr. Eves: I would like to have your thoughts on a couple of other matters. First, you said at the outset, I believe, that you saw as a problem the method proposed in the Meech Lake accord for the admission of new provinces. Could we have your thoughts on that?

Mr. Cook: It seems to me that at the very least we need to have some better explanation on the admission of new provinces, which was once in this country simply a matter between the federal government and the new province, and then in 1982 it was placed in the category where it required agreement of a proportion of the other provinces before admission could take place, and it now has been moved to the category of unanimous consent.

1200

I do not understand why Prince Edward Island should have an enormously deep concern about whether or not the Yukon becomes a province of Canada or not. It is unfair to pick on the smallest province of Canada. I do not really see why the province of Ontario should have a veto power over that. It seems to me to put those people who have the misfortune to have moved to the Yukon in a position where they may have to wait for ever to achieve provincial status. Or, alternatively, when the proposition comes up, each one of these provinces is going to say to the federal government, "We would like a little of this or a little of that before we will put our hands up in favour of this."

I think it is entirely unacceptable, frankly.

Mr. Eves: The last point I wanted to touch on was the point made by one of the witnesses yesterday, Professor Baines from Queen's University. She was concerned primarily with whether or not the accord affects "women's charter-based equality rights at risk" to quote her. She said failing the lack of a consensus among this committee or others to amend the Meech Lake accord, she was suggesting there was precedent for directing a reference in the form of the constitutional reference case of 1981. What would your opinion or thought on that be?

Mr. Cook: That is a question, sir, in which I think I would simply say that if she, who is a constitutional lawyer of some standing, believes that is possible, then I think she is correct.

I do however know, as you probably know, that some effort has been made to get a reference case on the issue that you asked me about earlier, about the provincial matter, and that has been unsuccessful. It is not absolutely clear to me whether such a reference case could be referred to the court, or whether the court would accept such a reference case.

Mr. Morin: What would you do about referring the definition of "distinct society"?

Mr. Cook: A reference case? I think it would really be putting the cat among the pigeons to ask a court to define that subject before it had a specific case before it. I really suspect the court would be unable to do it.

I also think, in keeping with what I said earlier, in my view that is not the court's job. This is a political decision and the political leaders of this country must come to an agreement about what they mean by such fundamental things as that.

Mr. Chairman: Professor Cook, I do not think there is anyone around

this table, or perhaps in this room, who is happy about the process by which this accord was reached and I do not imagine, certainly speaking for myself, I would never want to have to look at a constitutional document in this way again.

None the less, a situation evolved where these 11 people agreed to an accord and then brought it back for comment and discussion. One of the problems then that I think we have is that there is, if you like, I suppose the difference between dealing with this where it was open-ended in terms of changes and so on and where there is a sense of being constrained, is that this fact creates a certain reality, a reality in Quebec, where one of the factors, as we look at the comments from different groups and try to decide what our recommendations should be to the Legislature, is what will the impact be on the province of Quebec if we were in fact to reject this?

Obviously, we cannot know with any certainty, but I think that in terms of your own historical work, your long connections with the province of Quebec and with various people there, what would your suggestion be to us in terms of how we should approach that matter? What impressions do you have in your own conversations with colleagues and others in Quebec as to what the feelings might be if we were to either reject the accord or to request the specific amendments?

Mr. Cook: Mr. Beer, this is a question that historians always get asked about the future, is it not? I think I would begin by saying, to repeat what I said initially, I am not really urging you to reject it, I am really urging you to say this is a wonderful first draft and let us go back and see if we can make some improvement on it. If no improvements can be made, then we get to the next step, which may, in fact, be, "Would you reject it or would you not reject it, Professor Cook?" I guess I would reject it, but that is not the stage we are at yet.

I do not think we can predict what would happen in Quebec. On December 5, 1987, Premier Bourassa said: "Si les Québécois tiraient la conclusion que la reconnaissance de la société distincte n'est pas acceptée par le reste du Canada, je ne sais pas comment ils vont réagir." "I do not know how they would react," he said, and so I cannot go beyond the Premier of the province and make a more firm prediction.

I think it would cause a serious problem. Some politicians would argue that, "You see, there they won't even accept the most modest sort of agreement." But over against that, I must set the fact that, as I cite at the beginning of my paper, Claude Morin, who says that if this distinct society business turns out to mean nothing, then Quebecers will be very angry and they will be fighting again.

Professor Leon Dion, who was adviser to the Royal Commission on Bilingualism and Biculturalism, to the Pepin-Robarts commission and for a while a special consultant to Mr. Rémillard of the Quebec government, the new Minister responsible for Canadian Intergovernmental Affairs, in a new book which he published two or three weeks ago, said precisely the same thing. "If this does not mean anything, if this does not give Quebec the kind of protection that we believe Quebec should have, I will personally join the independence movement," says he.

Two academics do not make a landslide, but there are both sides of this issue, I think. Obviously, it is dangerous. Obviously, it is difficult. But once again, as I said earlier, in the past the Quebec government has turned

down constitutional propositions accepted by others, and we returned to the bargaining table and began to work again.

You flattered me at the beginning by saying I had been studying this matter for a long time, and it is true. One thing I have concluded over 30 years is that the people of Quebec do not react to things in a kind of lightning-bolt fashion. We have been fearing for those 30 years that one last mistake would end with Quebec separate, and I think this is not the case. This is a people who are very realistic, hardheaded, hard-nosed and, in general, wonderful, in my view, but they are not simply going to say: "That is a terrible slap in the face. If we cannot have that, we do not want anything." I think that is simply not so.

To repeat what I said at the beginning, my proposal is not to reject but to try to reopen and discuss some of these things further.

Mr. Chairman: Mr. Allen, if there are no further questions, this will be the last question.

Mr. Allen: I suppose, more than most of us, either in the academic or in much of the political community, you have been reasonably close to Mr. Trudeau over a number of years and have a sense of the way his mind works. I have been puzzled, and I think other members of the committee have been puzzled, by Mr. Trudeau's reactions to Meech Lake, not always surprised at all points but certainly in the overall cast of response.

In light of the fact that many of the things Trudeau himself tried to accomplish, for example, in the white paper of 1978 and the bill that followed, which did not finally see the light of day, the operating style with respect to shared-cost programs and his own words describing that whole arrangement, that he was willing to look at significant Senate reform, did not seem to be unusually concerned about including the provinces in consultations around Supreme Court appointments and so on, it seems strange that the agreement that should have received such a completely frontal attack by him. Much that he says in his response seems to deny much that he was earlier going for.

1210

Can you explain for us Mr. Trudeau's reaction to Meech Lake? Is there something that is extremely, terribly and greatly different here from the cast of his own political behaviour over the years that he was in power?

Mr. Cook: Mr. Allen, I think that is an unfair question. I do not think anybody can speak for the former Prime Minister of Canada in these matters or in any other matters. I would not try to, other than to say this. "Distinct society" is a code word for special status. That is really what "distinct society" means, if we want to get right down to it. You may recall that with respect to Mr. Trudeau's career, before he entered politics and after he entered politics, the one thing he shared with Mr. Lévesque was always the conviction that special status was an unending debate about the meaning of a term that could mean absolutely anything, but what it implied in his mind was the idea that Canada was composed of two different nations.

What he stood for all of his life was the conviction that Canada was one nation with two languages and many cultures and, as to the idea of special status, Quebecers did not need special status, that it was undesirable to identify the nation with the province, because once you identified the nation with the province, the nation would simply continue to demand and ask for more.

Whatever else Mr. Trudeau may have thought about the details of Meech Lake--the decentralizing effect and so on--there is no question in my mind that his central concern was that we were returning, as I believe we are too, to the debate we thought we had ended in the 1960s, that is to say, the debate about the definition of this business of what used to be called special status, particular status, associate status, and we are now calling it distinct society. We are going to find that we will have unending debate about what that means in the next 10 years. The debate we thought was finished has now been reopened. I believe that to be his view. If it is not his view, it is mine.

Mr. Allen: If that term and that concern about special status, distinct society, all the terms that you reeled off, continue to be a constant factor in the reality of our political life in Canada, why then is there such an intense problem in embedding that language in the Constitution?

Mr. Cook: Because I do not think it means anything. It does not mean anything clear. What it means to you, it means something different to somebody else. I think the people of Quebec are very straightforward people. If you say to them, "Here is what you are; you are a distinct society," they will then say, "Well, being a distinct society implies that we should be able to send ambassadors to France." If you then say, "But I didn't mean that," they are going to ask you, "Then what did you mean?"

That is what I would say. If you say that Quebec is an elephant and they say, "Well, now give us the hay to feed it;" and if you then say, "There isn't any hay," they are going to ask, "What kind of an elephant was that you gave us?"

I am being silly now, but I do not mean to sound silly. Let us talk about what it is that we are talking about, instead of using these wonderful big phrases. This is not a lecture hall in political science or history that we are talking about. It is writing a constitution that the Canadian people have to live by.

Therefore, I think it should be a lot more precise and understood by the people who are being asked to accept it. I really do think we are reopening this debate that preoccupied us so much in the 1960s and the 1970s. Perhaps that is the only route we have to go, but it makes me despair a little bit that we do.

Mr. Chairman: I am going to give the last question to Miss Roberts, who had to leave when she was on the list.

Miss Roberts: I will be as brief as I possibly can. From a historical point of view, what is the importance of Quebec's being left out in 1982? Is there any importance with respect to that?

Mr. Cook: From the point of view of the history of this country, it is simply enormously important. The community of this country that is French-speaking, part of which is in Quebec and part of which is not in Quebec, is absolutely fundamental to the country. I think it is terrifically important. From a constitutional point of view, of course, it is of limited importance since Quebec was never out of the Constitution. I lived there all last summer and I did not have to have a passport to go to Ottawa in the summertime.

I think that it is very important to arrive at an agreement, not an

agreement at any price or not an agreement at a price that we do not know what it is. It seems to me that Quebec being out of the Constitution is not something we can accept as agreeable for even five minutes, but on the other hand, we should work at developing a constitution that is satisfactory to Quebec, which will also be workable for the rest of us.

To that let me add that if there is any sense in English-speaking Canada that once this Constitution is accepted, Quebec will be satisfied with everything it has got, let me assure you this is not true. Premier Bourassa has already announced that the next constitutional amendment he wants is one that will allow him to restructure his school system on a linguistic rather than a religious basis. So there are more items on their agenda as well.

My answer to you is absolutely of fundamental importance to me. My conviction about this country is that it is a country in which there is in some ways one very fundamental community which is French-speaking and another which uses English as its language but is composed of a great variety of other peoples. There cannot be a Canada, as I understand it, without those two peoples.

So there must be an agreement about the Constitution. I would like it to be one in which we are clear in its meaning so that we do not continue to have this debate about what it means to be in the Constitution. That is not a very good answer.

Miss Roberts: Is it fair to say that even if we are clear, as we have been or have attempted to be in the past, there is always going to be a challenge to the courts with respect to it, or there may very well be?

Is it the thrust of your paper that "distinct society" should not be used as a general term but that we should try to more clearly define what Quebec may wish such as set out in section 91 or 92, something like that? You are saying, "Do not use that term at all, but try to redefine something that deals with Quebec in certain areas that they think is appropriate." Is that not correct?

Mr. Cook: Yes. If you push me to that point, I would say that I would prefer the term "distinct society" were not used. I do not think it means very much, frankly. I would rather the concrete powers that the province feels it needs in this Canadian federal system of ours were clearly defined and understood. That would be my view. If, on the other hand, it does satisfy some people in a symbolic sense to be able to say that they belong to a distinct society, that could be put in the preamble. I certainly would not object to that.

As I say, "distinct society" is not a very satisfactory term. Who would deny that Prince Edward Island is a distinct society? It is not a very meaningful term, it does not seem to me.

Miss Roberts: You appear not to have too much faith here or wish not to put too much faith in the Supreme Court in dealing with various clauses. You feel it is more important that the legislatures of the provinces and/or the federal government set it out as clearly as they possibly can. But is it not a fact that no matter how clearly they set it out, that is always the last resort, the problem being what type of evidence and what type of thought process the judges of the Supreme Court go through for the purposes of arriving at their particular decision?

Mr. Cook: Let me apologize if I led anyone to believe that I did not

have any respect for the Supreme Court, because I have an immense respect for the Supreme Court and all of its members. But I have such respect for them that I think we should be careful about how much we increase the burden of the work that they already have to do. It seems to me the greater the generality, the more the court is going to be called upon to make decisions about very fundamental questions. Again, I repeat, I think this is a political question, not a judicial question, but there is no doubt in my mind that the court is still going to hear cases about these matters.

We are in the future, let me remind you, going to have a court which not only has greater responsibilities but we are going to have a different court. We are going to have a country in which the Supreme Court justices of the provinces are appointed by the federal government and the federal Supreme Court justices are nominated by the provinces, which is a kind of Alice in Wonderland world, but there it is. We are going to have a new set of judges who will be nominated by the provinces. It seems to me that given that fact, given the overall decentralizing implication of Meech Lake, it is all the more important that we have a fairly clear and specific understanding of what that agreement means. But my respect for the Supreme Court is, I may say, even greater than it was before the Morgentaler decision.

Mr. Chairman: On that positive note, we want to thank you very much for coming and putting forward some challenging views with respect to the accord, ones which we are going to have to consider most closely. Thank you again for being with us this morning.

The committee recessed at 12:21 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, FEBRUARY 4, 1988

Afternoon Sitting

Draft Transcript



SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Witnesses:

Individual Presentations:

Russell, Peter H., Professor, Department of Political Science, University of
Toronto

Eberts, Mary, Legal Counsel; with Tory, Tory, DesLauriers and Binnington

AFTERNOON SITTING

The committee resumed at 2:07 p.m. in room 151.

Mr. Chairman: Gentlemen, we will begin the afternoon session. We are delighted to have as our first witness Professor Peter Russell of the faculty of law, University of Toronto. I might note for those who are not aware of it that Professor Russell is probably our main expert on the Supreme Court of Canada; he certainly is one of the main experts on the Supreme Court of Canada. He has brought a paper with him which we are copying, although he is going to speak from notes. Without further ado, I will turn the microphone over to you, Professor Russell, and let you begin.

PETER RUSSELL

Mr. Russell: Thank you, Mr. Chairman. With respect, may I correct one thing. I think I heard in the introduction that I was from the faculty of law. Since it is probably a great violation of the regulations of the Law Society of Upper Canada, if not the Criminal Code, to parade oneself as a lawyer, I want to hasten to correct the record. I am a member of the department of political science and I am a political scientist, not a lawyer.

Mr. Chairman: We have been overwhelmed by lawyers this week. We are delighted to have you here as a political scientist.

Mr. Russell: I am going to cover three items in my opening remarks and then answer any questions members may have for me. First, I will say a little bit about my overall appraisal of the Meech Lake accord; second, a little bit about the Supreme Court of Canada proposals because as you indicated that is an area where I have some special interests; and finally, I would like to say a few things about the future constitutional meetings and what I hope might be a position Ontario would take in future constitutional conferences.

To begin with the overall appraisal of the accommodation, the Meech Lake accord, I am here to urge you to recommend to your Legislative Assembly that you support the accord. I say that because I regard it as a reasonable accommodation with Quebec. I should explain in just a few words why I think it is so terribly important at this stage in our history to come to terms with Quebec, and more precisely, to make amendments to the Constitution that will make it possible for Quebec to accept the amendments that were made to our Constitution in 1982, amendments that were made without its support.

I regard it as of great importance to obtain Quebec's support for our overall Constitution, including the amendments made in 1982. I do so because I think that accommodating Quebec is essential to move us closer to a constitutional democracy in which the Constitution is based on the consent of the people.

For Quebec, this is particularly important. In 1980, for the first time since being militarily conquered by the British, the people of Quebec, particularly the Québécois, the French Canadian people of Quebec, were directly consulted on the kind of regime in which they wanted to live. We all remember that. It was the kind of debate a society cannot go through very often.

They went through it and participated in it and they decided, by a rather slight majority when one thinks of just the Québécois, the French

Canadian population, in favour of Canada as their future, but on condition. What was that condition? The condition was that they were promised a changed Constitution, "a revitalized federation," in Mr Trudeau's phrase. Mr. Chrétien and Claude Ryan used other phrases. Vague, yes, but still pointing in one direction: some changes in the structure of our Constitution that would give some special place for Quebec.

The promise was not fulfilled in 1982 to those people, that majority of Québécois who voted for Canada. We welshed on the promise. It is time we came clean. That is why it is important to accommodate Quebec. It is not a legal requirement--we know that--but I think it is a moral and a political requirement if we are to have a country with a Constitution based on the consent of the governed.

It seems to me the only alternative to this accommodation is to argue (a) that you do not need to accommodate Quebec, that it does not matter. Some people may believe that. Some people may not believe in the principle I put to you of government by consent or may not believe it is particularly important to gain the support of the Québécois. I disagree with those people about their vision of our constitutional ethic. Or it is perhaps possible (b) to say, "Yes, accommodate Quebec, but we can do it on better terms, maybe later on." I think that is highly doubtful. I think it is very doubtful that an elected government in Quebec can present the rest of Canada with, shall we say, milder, less demanding terms than Mr. Bourassa's terms, which form the foundation of Meech Lake. That is where I profoundly disagree with my distinguished historian friend, Ramsay Cook, from whom you heard this morning.

I will concede that while we have to make some changes in our Constitution to accommodate Quebec, I would not accommodate Quebec at any price. In other words, maybe their terms are low, but still, have they exacted too great a price from the rest of us? To accommodate Quebec it would be foolish to fatally weaken the capacity of our national government to deliver the level of services in the area of the economy and justice that Canadians want. It would be foolish, in effect, to erode our Charter of Rights and make it a weak and inept instrument for protecting the rights and freedoms of Canadians.

If I thought for a moment that we had done that or were doing that in accepting the Meech Lake accord, I would be opposed to the Meech Lake accord. But I am not convinced for a moment, nor indeed, I would say, are most of my colleagues in my discipline. You have heard from some and you will hear from more that we are, in terms of Meech Lake, fatally weakening the central government in Canada or fatally putting holes and weaknesses in the Charter of Rights, or even saddling our country with an excessively inflexible amending formula. I do not think we are doing any of that. Again, if we were, I would be opposed to Meech Lake. So overall, that is why I favour the accord and hope your Legislative Assembly will too.

Let me move on to say a bit about the one part of the accord where I have done a fair bit of work in the past as a scholar, and that is the Supreme Court proposals. I think your clerk is distributing copies of a paper that I wrote for publication in an academic journal called Canadian Public Policy. It will appear later this year. It is a rather long paper and I am not going to go through it all by any means, but I want to say a bit about the argument in it.

Basically, the argument in that paper on the Supreme Court proposals is that they represent a distinct improvement on the existing method of selecting and appointing Supreme Court judges.

Why is that so? Well, I believe it is so because as a principle of constitutional government I think it is essential to have some real checks and balances in how the judges on the highest court of the land are selected and appointed. I think in principle it is wrong to have the power to choose those judges concentrated in too few hands. The judges on our highest court are, among other things, the adjudicators of our federal system, of our federal disputes between our two levels of government, as you well know. They also, since 1982, have assumed an enormous role in adjudicating disputes about the division between the power of government and the rights of citizens.

To put the process that selects those judges, with that enormous power, all in the hands of a few politicians in one level of government is, in principle, wrong. I say that without any animus or criticism of how the politicians in recent days, under both the Trudeau and Mulroney governments, have selected judges.

I think the Constitution has to be written for the long haul, and in the long haul I think we are in jeopardy if we do not build some checks and balances into the method of appointing the highest judges, who have such a role in interpreting and applying our Constitution. No other western constitutional country where the constitution as important and the judges' role in interpreting it is important has risked leaving such a monopoly of power in the hands of literally two or three politicians--really only two: the Minister of Justice and the Prime Minister.

Given that principle, the question is how you get checks and balances. We know how the Americans do it: They do it through their Senate. That is a formidable check and balance on the power of the American President to appoint judges. We have just witnessed what a check and balance it is through the Bork, Ginsberg and now Kennedy hearings. I add in parentheses that, I think this morning, if I read the Globe and Mail right, Mr. Kennedy's nomination was finally ratified.

I do not think we can have that check and balance in our system, because at this point in our history we do not have that kind of Senate. I need not expound on that to members of this committee.

1420

So where do you find a credible, significant check and balance in our system? There is no doubt in my mind that between elections in Canada--and it is between elections when judges are appointed--the strongest force countervailing the federal government, the strongest countervailing political force in Canada checking the federal government, is the provincial governments, their prime ministers particularly. They are the strongest prevailing countervailing political force in Canada. We may not like it. Some Canadians would rather have it in the Senate. But that is another country. This is our country, and in our country that is the way it has developed. Given that, I think it makes sense--and I have thought this for a long time, as have many other Canadians--that the provinces have a role in selecting the judges who sit on the Supreme Court of Canada.

The one criticism I would make of the way this role is provided for in the Meech Lake proposals is that I think the respective roles of the federal government and the provincial governments have been put, if I may use a crude phrase, ass backwards. When you think of it for a moment, we have the provinces under the Meech Lake proposal playing the nominating role that the American president performs, and we have the federal government playing the role which in the United States is played by the Senate.

I think it would make a lot more sense were it reversed. I do not think it is so bad as it is that we have to go back and try to renegotiate the accord, but I do think it points one towards how this defect might be remedied. The remedy should point us towards getting a more responsible and balanced process of nomination, instead of just depending on the sort of ad hoc, maybe rather political, nominations that will flow from provincial governments.

The kind of remedy that I think should be put in place is one that needs no amendment to the Meech Lake accord. It can be done quite informally. It has been put forward by two important bodies in Canada. One is the Canadian Bar Association. I hope that will not taint it too much with the nonlawyers on this committee. I can see one of you saying: "Gosh, that is the kiss of death. It came from those people." The other is the Canadian Association of Law Teachers.

To their credit, if you read their reports, you will see that they transcended what has perhaps been a narrow focus of the law profession in the past on the selection of judges. They have called for, in each province, the establishment of nominating bodies which in no sense are dominated by lawyers, nominating committees that would have four kinds of members: (1) really political members representing both levels of government; (2) some judges; (3) yes, some lawyers; and (4) some ordinary folks who are not lawyers, judges or politicians, some lay people.

They have various formulae. I think the numbers one can debate and argue about. My own notion would be for each province to do this according to its lights and in negotiation with the federal government. I think there is room for a lot of experimentation here. Nothing should be cast in stone. We should experiment on how to set up useful nominating bodies that have a chance of producing a judiciary not only for the Supreme Court but, just as importantly, for the other courts to which the federal government unilaterally appoints judges in every province, a judiciary that will represent the diversities of this country, its political diversities and social diversities.

I think that is something the Ontario government should be urged to work on--I think it may already be interested in moving in that direction--and, I repeat, need not and should not be put in the Constitution. We do not know enough about this kind of process to entrench it in the Constitution. Maybe 100 years from now we might have worked out something that we are all happy with.

Let me leave the Supreme Court, although I would be happy to come back to it. There is a lot more I would like to say on that, but I would like to move on to my third point, which may be for this committee the most relevant point in terms of your committee having a real influence on the future. I say that because if I was Jimmy the Greek, I would think Meech Lake is likely to go through the assembly, given my sense as a political scientist as to how governments work. You know what I mean.

What may be much more open to change and development through the influence of your committee than any change in Meech Lake is what happens when the next first ministers meeting occurs on the Constitution? To my horror, but my humorous streak was aroused also, section 13 of the so-called Meech Lake accord welcomes us to a first ministers' meeting on the Constitution at least once a year commencing in 1988 and, as I read it, not only the year after that

and five years after that and 10 years after that, but 100, 200 or 300 years after that, which literally blows my mind.

What other country in the world would build into its Constitution a commitment to discuss and debate the Constitution at a first ministers' level every year for ever and ever? I would hope one of the first amendments is to put some time cap on that particular clause. However, there will be and I think there needs to be, some meetings in the immediate future because there is some unfinished business before Canada on the Constitution. We certainly know that in the aboriginal rights area. Our citizens and governments in our northern territories have constitutional interests that have not been addressed and they need to be addressed.

We also know that in the western part of the country particularly, not exclusively but particularly in the western part, there is a big interest in a major restructuring of our federal Parliament, an interest that focuses on the Senate and the idea of replacing our upper chamber in Ottawa with a new kind of body, a new kind of Senate designed really on Australian lines; what is popularly called a triple-E Senate: equal representation from the provinces, elected, and effective; meaning with full legislative power.

That will be on the agenda I should think, if I have been reading the papers correctly, probably, most likely the next time the first ministers meet, which if section 13 of the accord becomes law, would have to be in 1988. I am here to put in front of you an alternative idea to an elected Senate that I hope at least Ontario and maybe other provinces might consider. The alternative to an elected Senate, in my mind, is to introduce a measure of proportional representation into the House of Commons. I suppose the other side of that notion is then to abandon the Senate.

The reason I think you should, I hope, think about that alternative, is I think it would be a more effective way of dealing with the structural inadequacy of our national Parliament, the inadequacy that the triple-E Senate is aimed at, without creating some of the problems that a triple-E Senate will give us. The inadequacy that most spokespeople of the triple-E Senate are concerned about in our federal Parliament is its apparent limitations in adequately representing the diversities of Canada, the regions of Canada.

We went through a period, particularly in the 1970s, when each of our national parties was very strong in one region of the country and not so strong in the other: the Conservatives strong in the west but weak in Quebec, and of course the Liberals the reverse of that.

1430

With our electoral system of first past the post, it created governments in Ottawa and government caucuses that seemed to severely underrepresent: if it was a Conservative caucus, underrepresent Quebec; if it was a Liberal caucus, severely underrepresent the west. In the case of the west, that led to so-called western alienation.

The idea is to have a Senate in which that could not happen, so that if the government in power responsible for the House of Commons had particular regional bias, it would be compensated by the representation of all the regions equally and all the provinces in the Senate.

Now, my argument would be that the trouble with having an elected Senate is it would make the conduct of parliamentary government in Ottawa extremely

difficult. I did not realize how difficult until I spent six months last year in Australia, rather carefully watching the Australian Senate, before and through and after an election.

What I can tell you is that the problem there with the operation of that Senate is that it gives the balance of power in national government to a very small number of senators in the Australian Senate. You may ask, why is that? I will tell you why, and I did not understand why until I went and looked at it. When they have a Senate election there, they have proportional representation as their method of election for the obvious reason that if they have the same method of election that they had for the House of Representatives, it would produce much the same result and you would not get the different complexion.

Under proportional representation, the two major parties split the vote very closely, as happens in our elections. Each gets about 47 to 48 per cent of the vote. You add that up and it is about 95 per cent. So they each have 47 or 48 per cent of the Senate. Guess who has the remaining five per cent? The oddballs. Interesting oddballs. Small parties. Maybe we have some here and maybe you guys like that. I will tell you what it does for the government of the day. The government of the day has to take all of its legislative program to four or five senators, who received about five or six per cent of the vote, and see if they approve of it bill by bill. You may like that; I think that is an abomination for parliamentary governments.

My one final point about not having the Senate is that I happen to believe we have enough checks and balances on our federal government as it is. I think checks and balances are good. I do not trust anyone very much in politics and I want some checks and balances.

In the United States, there are two major checks on the President: Congress and the Supreme Court. It is the same in Australia. The Senate is a real check on the government of the Commonwealth of Australia, as is the High Court of Australia. It is a tiger.

In this country, we have two checks. We have a Supreme Court. It is becoming a tiger. We have 10 Premiers. They are tigers and they are not going to become pussycats with an elected Senate and I think two checks and balances are enough. If we do some restructuring of Parliament, and I think there will be pressure at the first ministers' conference to do so, I would prefer that thought be given to changing the electoral system, at least for part of the House of Commons. If you have studied the proposals for proportional representation, I think you will see how they could remedy to some extent the regional skewing of representation that occurs under our simple first-past-the-post system.

I will conclude my opening remarks there.

Mr. Chairman: Thank you very much, Professor Russell. I am not sure whether each of us at some point is perhaps an oddball, but we will certainly take those descriptive remarks to heart as we consider our recommendations.

Mr. Breaugh: I feel like I am half way to the Senate already.

I want to pursue a couple of what I consider to be typical Canadian aspects to this. It strikes me, first of all, that the accord itself is very much a Canadian kind of document. It is based on the premise that we will all be reasonable and nobody will get outrageous and the thing will kind of work out. If you do not accept that premise, then you really do get caught on the

precise words that are used in the agreement and the things that are not said in there.

For example, in appointments to the Supreme Court, the document itself does not do very much in the way of fine print, but it establishes the principle that essentially these will be nominated by the provinces and subsequently will be put in there in some way by the federal government. I note that in your paper you went to some lengths to describe how we might go through a process that would not exactly vet the candidates, but would provide background or a means of bringing forward nominations.

But all of that is really not much different from the current situation. For example, it has been rumoured, although it is hard to nail this down, that the way people get appointed to things like the Senate or the Supreme Court of Canada is that someone in the federal government calls a friend in the Premier's office and says, "Who do you know who would be an appropriate person to nominate to the Senate of Canada or to the Supreme Court." With some reservations about whether they are qualified, particularly in the Supreme Court decisions, friends of a government tend to find their way into those posts.

I do not see the accord being very much different from the status quo. It is formalized. There is a process. It will lend itself to a kind of embellished process, as you have done in your paper, but I do not see a startling difference. I would like to get your comments on that.

Mr. Russell: Sure. I think my comments really are addressed to a kind of appointment, Mr. Breaugh, which we have seen very little of so far in our history. They are what I call ideological appointments. We have certainly seen lots of them in the United States. It is the difference between appointing a judge because he is simply known to you and has been a friend of your party--that is what I call appointing cronies--and appointing an ideological soulmate.

What we have been seeing in the United States for a great many years, by no means just with President Reagan but going away back in American history, is a consistent effort by presidents to put not so much their cronies--Bork was no crony of Ronald Reagan--but to put their ideological soulmates on the court so that they would steer the constitution in the direction the President wanted it steered.

We have had rather little of that, Mr. Breaugh, in our history. Our historians have delved into the archival material and have found on occasion some of that. In the book by Frederick Vaughan and James G. Snell on The Supreme Court of Canada, there are some interesting and somewhat amusing accounts of John A. Macdonald asking his justice minister, "Is he sound on Dominion powers?" That is the kind of thing.

As we move into what I call charter land, and we took a big stride into charter land last week with the Morgentaler case, people, both politicians and ordinary people, become more and more interested in ideologically shaping the court. Those who feel they lost in the Morgentaler case will be arming themselves to try to reverse that, in part by influencing the appointment of Supreme Court judges. Those who feel they did well will be equally concerned to ensure that the right-minded type of judges who made up the majority in Morgentaler will be replaced by judges of similar ideas.

If you do not build in some checks and balances, the danger is that you

could enable a Prime Minister who felt deeply, as President Reagan felt, about what the court was doing wrong, to try to remedy and influence the course of constitutional interpretation by packing it over time. If you look at the chart at the back of my paper, you will see how the appointment of Supreme Court judges comes in clusters. It is very odd. It is not as if you appoint a Supreme Court judge every two or three years, so every Prime Minister gets his crack at it. It does not happen that way. It has not happened that way in the United States. Some presidents, like some prime ministers, will get a real go at it; others will not.

If you look at that chart and simply assume that there are no early retirements--the nine judges who are there now serve until age 75--you will see there is no vacancy until 1991. Then all of a sudden there are three. So if you were a Prime Minister and a justice minister in power from 1991 to 1994, you could on put three judges. Then if you were unfortunate enough to be the Prime Minister of Canada from 1994 to 1999, you would have a dry run, like Jimmy Carter. Then if you were lucky enough to be the Prime Minister of Canada from 1999 to 2003, you could virtually restructure the court by appointing a majority of judges.

I think we should put in some safeguards against that. There are none now. That is not because I suspect Brian Mulroney or accuse Pierre Trudeau of having an ideological approach to appointing judges. Quite the contrary; I cannot see that in their appointments at all. But I am afraid of the future. Meech Lake does give the federal government the final appointing power, but it can only appoint judges who have been named by one or more provinces. In the case of Quebec, it has to be Quebec province. If it is not a Quebec vacancy, it has to be one of the other provinces.

Mr. Breaugh: Just two quick points to conclude: I made the assumption, and I think most people would in reading the accord, that some process such as the one you outlined in your paper is required and therefore people will do it. Would you advocate, for example, that this committee take under consideration some recommendations about the process, without getting too finite about it or without laying down one example of how to do it, just simply speak to the matter that we all made the assumption that there will be some recognized public process to it, some establishing of credentials?

I think I agree. I do not share the concern that, for example, the current Premier of British Columbia, who is of a different political stripe from any of the other premiers, would take it upon himself to appoint someone who was very right wing to the Supreme Court of Canada. I do not think he could really do that. He could cause some problems for a while but he could not accomplish that.

That is one thing I would like to pursue with you. The second thing is, as the Supreme Court takes on more and more of a significant role in establishing what is legal in Canada--I think the events of recent weeks have shown that it has certainly begun to do that--one other thing becomes apparent, that our system of government is not really plugged into that yet.

When the Supreme Court makes a decision and says, "Tomorrow morning at 9 o'clock, all your therapeutic abortion committees are no longer legally required," the rest of the country goes spastic for a while. Attorney generals say, "We do not know what that means." Hospital administrators say, "We are not sure how to handle that. The Ontario health insurance plan does not know how to do that."

In other words, our political system is basically one which is different from the United States. Normally, if a major change like that were going to happen, the politicians would say, "The ministries will go and negotiate for six months and we will implement that next August 15 and we will have a start date."

When the Supreme Court is the agency which makes the decision and says, "As of now, the law is changed," it sometimes traumatizes our political system.

Is there anything that you can think of that we could do that would assist us, because I think, whether you agree with the Supreme Court's decision or not, you cannot agree with creating chaos, which is tantamount to what we are doing here?

What kind of a process could be used that would, if not eliminate that, at least get it into manageable proportions?

Mr. Russell: On the Supreme Court side it is possible for it to adopt in some decisions a policy of what is called prospective overruling. We saw a rather interesting example of it in the Manitoba language rights case, although it was not done very smoothly. It was done in two steps. They first ruled that all of the laws of Manitoba since the province's beginning had to be in both languages. Then, a few years later, realizing the havoc that might occur if laws that had not yet been translated into French were not laws--it takes years to translate all those laws--the court gave Manitoba five years to comply with the constitutional standard the court had laid down.

That is an extreme case, I grant you, but it is possible, if attorneys general see that type of problem looming ahead, if a constitutional ruling suddenly overturns some important part of the legal system, in their pleadings before the court, they may say, "If we are so unfortunate as to lose this case--we think that is very unlikely, of course," they would say--"if that unlikely thing happens and you rule against us, could we at least ask you to attach some sort of condition to give us time to get our house in order?"

I think that could be done. It would be better for it to be asked for than for the court to have to dream that up on its own, and to be one of the things that is argued about and discussed in the case. That is something for attorneys general to think of in preparing their arguments. Perhaps it is not something they want to push too hard, because they hope the laws they are defending before the Supreme Court of Canada will stand up, but sometimes they will not.

Mr. Breaugh: How about the process part, the process of selecting the nominees to the Supreme Court.

Mr. Russell: I think that is where we really have to do some experimentation. I certainly think that is the way to go in general for the committees I have talked about. I am not talking about the particular numbers of people who are on them, but structured along those lines, with people from those different constituencies in society.

I stress that those are needed in the provincial scene, less for the Supreme Court, though they would certainly help there, but more to give the province, its lawyers, some of its judges and citizens a role in selecting the

highest judges of each province, the judges of the provincial Court of Appeal, the High Court of Ontario, for instance, and the district court.

As it is now, the judges are all appointed federally with some informal consultation with provincial attorneys general and sometimes some judges, but it is a very hit-and-miss affair. Having these committees in place would mean that the ideas that are fed in, the names that are fed in and the considerations that come into play in selecting these judges for all these courts would be much broader and would come from many more areas of society than they come from now with a better chance, I think, of getting the kind of judiciary we want.

1450

What I am not sure about at all is how to make it more open. I am pretty dubious in our culture of doing what the Americans do in theirs and putting candidates for judicial office in the hot seat, in a room much bigger than this, with national television, being grilled about everything from whether they ever smoked pot to what they think about abortion.

In the American culture, that has become as American as apple pie. It has been going on for well over 100 years and eminent American jurists and lawyers accept it as part of the American scene. I do not think that is the case in this country. I think some of our most talented lawyers and judges would be very averse to putting themselves through that public kind of grilling. I think we would lose a lot of darned good candidates. We would really reduce the size of the recruitment pool if we were suddenly to go American in that way.

I would prefer that we experiment with these larger committees. People know they would be there; names can be sent in that represent society in a broader way than the federal Minister of Justice can possibly, it seems to me, represent Ontario society; and let us have them interview and develop a short list of outstanding prospects.

Mr. Chairman: Professor Russell, questions that I think certainly have come up and are going to continue to come up are questions of interpretation. Clearly, as with the charter, so with the accord, were it to go through. We are then asking the Supreme Court to have to define a variety of things.

We spent some time on that this morning, particularly with Professor Cook, in talking about the distinct society and what did it mean, if it meant anything. If it meant something, should that not be set out?

From your perspective in looking at the Supreme Court and how it has operated, what is your sense about a term like "distinct society?" Is that something which one really does not want to put into a Constitution or is it inevitable that we have terminology that is necessarily vague? As legislators, as we look at this, we realize that for a lot of these terms, presumably, there are people who can argue on either side of that. What is your advice in looking at that kind of a problem and issue?

Mr. Russell: With respect to the term "distinct society," like the terms "peace, order, and good government," "property and civil rights," "the right to liberty and security of the person," "freedom of expression," they are all very general and vague phrases. Sometimes they are in constitutions precisely because the politicians who negotiated the constitutional

accommodation could not be more precise, because their accommodation did not go that far.

To take "distinct society," I suppose, one of the indistinct features of it is its impact on the charter. It could have said it has none or it has a lot. We do not know for sure. The politicians could not settle that. Frankly, if they had settled it in the way I think and predict the courts will eventually settle it, it will mean it has rather little impact on the Charter of Rights. But if it had actually said that in the text, that "nothing in this 'distinct society' clause shall influence the interpretation of the Charter of Rights," I do not think Mr. Bourassa can go back to Quebec City and celebrate the accord.

If it said the reverse and it overrides the charter, I would not think many of the other premiers would want to bring it, as they are doing, to their legislative assemblies. Something the same can be said of why we have phrases like "peace, order and good government" and "property and civil rights" as the key terms in defining the division of powers between our two levels of government in 1987.

George-Etienne Cartier and John A. Macdonald had a political agreement. It went so far, but if they had started to cross the t's and dot the i's on exactly what Ottawa could do and what Quebec City could do, their accommodation would have probably broken apart. So we sometimes leave things to history, and with constitutions that means the courts have a lot to do with what these general terms come to mean.

One thing I can tell you about courts, and it is the only thing you can be sure of and you can be as sure of it as you can be sure the sun will set tonight and rise tomorrow, is that the courts will change their minds. They will not stand still. They did not stand still with peace, order and good government, property and civil rights. The last word on the right to liberty and security of the person was not written last week in the opinion on Morgentaler. The American Supreme Court should show us that. They have been all over the place throughout their history.

You can go further. Look at the West German court, the Indian court or the Irish court, all involved in interpreting vague phrases in constitutions. Judicial culture, like political culture, does not stand still. That is what makes it an interesting subject to study.

Mr. Allen: Thank you. It is very interesting that you should say history will decide, and the historian who was with us this morning did not want that to happen, apparently. In your opinion, just briefly on that before I get on to something else, Professor Russell, is there really any great difference in lodging the "distinct society" language in the preamble as distinct from lodging it where it presently is proposed to be in the text?

Mr. Russell: I think so. I think it is stronger as an interpretation clause than it would have been as a preamble. This is something to address to those constitutional lawyers who have read constitutional decisions on each. We have had very few constitutional decisions in our own country on what are called interpretation clauses. We have the multicultural interpretation clause in the charter now. It is occasionally referred to not as a decisive point but really to strengthen what the court was already doing in interpreting the charter. So we have a very slight track record in our own country's jurisprudence on what an interpretation clause means.

We have more on a preamble. In quite a few cases, the preamble to the British North America Act was used; some judges saw in it some foundation for fundamental rights and freedoms from the British parliamentary tradition, because our preamble says we have a Constitution similar in principle to that of the United Kingdom.

On the whole, the preamble did not turn out to be a very strong basis for very much in our constitutional law. So I think an interpretation clause is a shade stronger. It is certainly something that can be introduced more systematically by lawyers where they can see it strengthening an argument as to how a particular clause might be interpreted. I do not think it can override the reasonably clear language of either the charter or any other part of our Constitution. I am very confident of that. That is not the role of an interpretation clause.

Mr. Allen: I gather that overall your position is that Meech Lake does not really represent a very radical shift in the evolution of Canadian federalism, that pretty much everything that is there has in one way or another been anticipated either in practice or what have you and that it does not, therefore, change major balances of power or interest or play of forces, provincial, regional or otherwise. Is that fair?

Mr. Russell: With one qualification. There is a time-bomb in it. It really is a time-bomb, and that is the interim arrangements for the selection of senators. You could see, over time--I doubt that it is going to happen. It would take a long time because senators are not dropping like flies, so there are not a lot of vacancies.

Mr. Breaugh: Either that or it is hard to tell.

Mr. Russell: Right. Remember, it is just the interim arrangement where the nominations come from provincial premiers and the Prime Minister says he will abstain from selecting his own senators and he will appoint people to the Senate who are named by the provinces until--that is why it is interim--there is some major constitutional reform or abolition of the Senate.

1500

Over time, if the premiers really pushed that opportunity, they could load the Senate up with some pretty interesting folks. The Senate that Mr. Trudeau loaded up is already creating a little bit of a problem in Ottawa. The kind of Senate the provincial premiers might build over 20 years could be dynamite, I should have thought, and that could change things. I think that is why it is a time-bomb ticking away and ought to put some sense of urgency into getting some other approach to Senate reform.

Mr. Allen: I suppose as long as the present framework of the Senate's exercise of power remains as it is, one could tolerate that kind of activity from the Senate as long as it was not triple-E and equivalent to the House of Commons in its overall power and capacities, because you can see an end to the road in the game-playing presently, if you want to put it that way.

Mr. Russell: Yes, that is true.

Mr. Allen: An item in that respect that you mentioned in passing was making the House of Commons proportionally representative. However, in some people's eyes, that would leave us open to some of the problems you suggested exist in another way in Australia, namely the problem of the emergence of

small groups that might hold inordinate degrees of power. Whether that is good or bad, none the less, I was a little bit surprised that you seemed to be accepting it in one place and not in another. Can you explain that for me?

Mr. Russell: Yes, indeed. With proportional representation, you are quite right, you would have a more fragmented parliament and more likely than not a minority parliament, which has been the result in many of our recent elections anyway, but we would have it even more often; no party with an overall majority. This is with proportional representation.

What you would have is, I think, the experience that European parliaments have: You would have the forging of a coalition government that builds right into the cabinet and to the making of government policy the points of view of at least two parties. That I think is more desirable than the Australian situation, where you have one party controlling the House of Representatives and the cabinet and making government policy. It is held up to ransom, bill by bill, in a most incoherent way, by a very, very small group in the other House. It makes it very difficult to have any kind of consistency and coherence in government programs.

I am all for a more, if you like, sort of pluralistic government that better represents the different interests in the country, be they regional interests or even to some extent ideological interests, but I would rather build that in a coherent way to a single government. Do you see the difference?

Mr. Allen: Yes.

Mr. Russell: I think Canadians should take a good hard look at this idea of an elected Senate with a different political complexion than the House and what that will mean to the governance of Canada, each with a mandate, a solid mandate to do its will, but with different wills as to what should be done. That is a parliament truly speaking with forked tongue, each prong of the fork feeling it is entitled to get its way. I do not think that is a good system. I think it is OK in the United States. You have a President and you have a Congress. That is a check and a balance. I explained that, but you do not have the states, otherwise, really checking Washington.

Mr. Allen: I guess the spanner in the works for either of those two models is the growing character of executive federalism, with the meetings of the first ministers. Either way you go, if you weaken the House of Commons by counterpoising it with a very strong elected Senate, then you also have the House of Commons having to cope with the first ministers, and you have problems. On the other side, if you proportionally represent the House of Commons and you fragment it and put that over against a very strong and emerging tradition of first ministers, then you are also in trouble, are you not?

Mr. Russell: I think the experience with coalition governments in Europe is that they are weaker than our one-party governments; but they are stronger than the minority governments we have. They are intermediate. I do not think a coalition government would be drastically weakened in negotiating with the premiers and it might even be strengthened if one of the parties in the coalition had a particularly strong base, let us say in a region of the country where the senior party in a coalition was very badly represented. It might give the government as a whole more authority to say it is speaking for all of Canada in a coalition of that type.

I could live without proportional representation, to be honest with you, in the House of Commons, as it is. I am putting this forward because I think if there is not an alternative on the table to an elected Senate, the people who are worried about it, and I am very worried about it, will be in a very weak position. I think it is a very popular idea in western Canada.

Miss Roberts: If I might return to your comments about the first ministers' conferences that are to take place on a yearly basis with respect to the Constitution, you have indicated to us what should happen next. What I am interested in is, what in your view should we, as MPPs, be doing? You indicate we should be talking about the Senate and looking at it. What is the process you are suggesting? Do we do that through a standing committee? Do you have any suggestions to us?

Mr. Russell: You are a committee dealing with constitutional reform. I saw that on the label on your door. It would seem to me well within your terms of reference--I hope I am not speaking out of order--to discuss among yourselves with a view to making recommendations to your Legislative Assembly what the priorities of this province should be as it goes into the next round of talks, what you see as the most important pieces of unfinished business, what should be on the agenda and what general positions Ontario ought to take.

Miss Roberts: In addition to what should be on the agenda, do you also have any recommendation as to how we can keep the process going? Just by a standing committee of the Legislature from time to time on constitutional reform? After we make our report back, there is no indication to the best of my knowledge that as a select committee, we are going to continue from year to year, as is set out for the constitutional ones. Do you have any suggestions as to what we could recommend to our assembly?

Mr. Russell: In terms of a reform of your assembly's procedures so that your recommendations get attention?

Miss Roberts: That is right.

Mr. Russell: I am not familiar enough with those procedures to speak to them. I just hope there is a way in which they can get addressed; that is, your recommendations. I think they ought to be. I believe very strongly that the process of developing constitutional proposals should be a more open one than it has been in the past.

Miss Roberts: More open? My question is, do you have any suggestions as to how it may be made more open?

Mr. Russell: You have made it more open this afternoon. You have had me here and you are inviting other citizens of the province to come and tell you what we think you should be recommending and I thank you for that.

1510

Mr. Chairman: Thank you very much, Professor Russell. I think you have dealt with a couple of subjects, the Supreme Court and the Senate, and raised some ideas and issues that we have not reviewed to this point. That will be most helpful as we continue. I was not sure whether you would have the same abhorrence to us continuing for the next 100 years as you were mentioning for the constitutional conference each year. In any event, that is something

we will have to address as well. Thank you very much for coming and being with us today.

I now call upon Professor Mary Eberts to come forward.

Welcome to the committee. I might just mention to committee members that Professor Eberts is on the faculty of law at the University of Toronto and also practises constitutional and charter litigation at Tory, Tory, DesLauriers and Binnington, and I believe it goes on.

Ms. Eberts: Yes, it does.

Mr. Chairman: Perhaps I will stop there. If there is anything else you would care to add, I know you have been active in a number of areas. I will leave it to you how you would like to set that out. We are in your hands as to how you would like to proceed. Please go ahead.

MARY EBERTS

Ms. Eberts: Perhaps the only thing I would add to your brief introduction is that I have been a student of constitutional process as well as a participant in it for--I guess I started in about 1970 when I came into your former office as a student. I must say that having succeeded you there and having seen the luster of the reputation you left behind you, this is a committee that is very well chaired.

The history I have with the Constitution, both as a student and an activist, if you will, has given me a particular perspective on the Meech Lake accord and on constitutional process generally. It is from that perspective that I wish to address you today.

I think I have provided to your clerk some copies of written remarks that I will leave with you. The two areas I wish to address today are constitutional process as it relates to Meech Lake and some of the provisions of the accord itself which have given particular unease to women's groups.

Let me begin by saying that although there are almost no accounts of it in mainstream constitutional scholarship or official government texts, women's involvement in constitution-making has a long and significant history. This year is the 60th anniversary of the Persons case, a decision of the Supreme Court of Canada dealing with women's eligibility to sit in the Senate and their identity as persons under the Constitution.

This year represents as well the 10th anniversary of women's recent constitutional history; that is, a meeting in 1978 when then Prime Minister Trudeau, in the dying moments of a constitutional conference, gave to the provinces jurisdiction over marriage and divorce. They had not asked for it and it had not been discussed up to that point, but he tossed it in as a concession the federal government was prepared to make. I happened to be hearing a CBC broadcast of that conference and I decided at the time that we were all in for a very interesting few years. I think you will agree with me, after your experiences even of the past few days, that this was right.

Women became very involved in the Constitution in 1978 as the result of that careless concession and it took several long months of lobbying by grass-roots women's groups to stop the federal initiative to concede marriage and divorce jurisdiction to the provinces. They were keenly concerned because a concession of such jurisdiction to the provinces would conceivably put an

end to a national divorce law and make enforcement of custody and support orders all the more difficult. So women have at least a 10-year tradition of seeing constitutional law in terms both of grass-roots action and also bread-and-butter issues for them.

Unfortunately, the 10-year period of constitutional renewal that has gone on from 1978 to 1988 has had, for women, several salient characteristics. I speak now both as an observer and a participant in what can be called the underside of constitutional review. I set out my summary of these points at pages 3 and 4 of my paper.

Constitutional decisions of great significance to women are made by men without notice to women, without consultation and in the absence of any essential awareness of women's interests. This is because, in large measure, the political figures and the senior bureaucrats who participate in these processes are men and because there is not an open consultation process prior to decisions being made.

If there is to be any hope of reversing constitutional decisions made in this way, women must be prepared to act on very short notice and with a massive show of strength and solidarity, and they do this on a shoestring. Action attempting to reverse an initial decision ignoring their interests often finds that male decision-makers have become very wedded to the decision that was made and any suggestion of change to it is greeted with enormous alarm. Resistance to women's concerns about constitutional initiatives ranges from the patronizing "Trust us," to ridicule, misrepresentation of women's position and silencing. Women are also threatened if they do not accept the deal as configured. "Things will get worse."

Point 5 is one that is exceptionally germane to the Meech Lake process and I will return to it in a moment.

Although women are told to speak with one voice or run the risk of not being listened to, decision-makers also tell some women that because of their regional, political or other characteristics, they have no right at all to be heard in the debate.

The last two points relate to the gains that women have made and lost in the past 10 years. If any gains are made by women, they are to be regarded as fragile, liable to be reversed without notice or consultation at the next meeting, and gains for women and equality guarantees in general are particularly liable to be sacrificed in the interest of provincial powers. That may be something that is particularly relevant to say in this House of assembly.

This pattern of women's involvement and experience in constitution-making was first evident in the making of the present Charter of Rights. Because of their activism over marriage and divorce in 1978, women were prepared when the federal government tabled a charter in 1980 and they were able to make a significant showing at the House and Senate hearings in the fall of 1980. As someone who appeared before that committee, I can also advise that at that time the collaboration between women inside and outside Quebec was very effective. In the work I did, I worked with a francophone academic from Quebec and worked for a council headed by an anglophone and a francophone chair and vice-chair. The co-operation between the two language groups was impressive and very encouraging.

The changes that were brought into the 1980 draft were not fully

responsive to women and to the concerns they had raised. When that was pointed out, we then saw the first round of, "Trust us." It was at Toronto city hall in October 1980 that the minister responsible for the status of women told a gathering of the National Action Committee on the Status of Women, "We know you may not like this charter, but trust us." He was greeted on that occasion with some discomfiture from the public hall, I can tell you.

The less known, I suppose, feature of the constitutional debates at that time was that when, "Trust us," did not work, there came a split along big-P political lines that affected a number of women activists, and I have recounted that. Certain women faced an election to choose between their loyalty to the minister and his government on the one hand and the women's constitutional process on the other.

1520

You are familiar with the resignation of Doris Anderson and the spontaneous happening of the Ad Hoc Conference of Canadian Women on the Constitution in February 1981. Behind the scenes, what happened was that during that period women known as big-L liberals were effectively silenced. They were either called to loyalty and silenced in the councils of the party or regarded with suspicion in the women's lobby because of their party loyalty, real or imputed.

This was women's first experience of the rule of thumb--I have used that expression quite deliberately with the historical reference intended--that women must have certain credentials or not have certain other credentials in order to speak out on constitutional issues. My experience is that the proponents of the Meech Lake accord have used this technique with cynical deliberation during this past summer's debate on the accord at the federal level.

The ad hoc lobby was successful in having section 28 inserted into the charter, but that was only one of a number of serious items that were on the women's agenda in 1981. No sooner had it been added to the charter, however, than section 15 and section 28 were made subject to the override that was added after the famous meeting of the first ministers and attorneys general in the Chateau Laurier hotel in Ottawa, another overnight special, where the November accord was drafted, giving the provinces and the federal government an override on the charter's guarantees. We do not know whether the first ministers actually agreed to put both of those terms under the override, but by the time the drafters were finished with it, they both were under. Again, once the drafting was done, the political authorities were very loyal to the drafters' work.

In the subsequent lobby that women had to mount to try to get these sections out from under the override, we were told, "There will be dire consequences to women if you are successful. We need the override to protect affirmative action." Women were directly pitted against the provinces. Some say this was the result of deliberation on the part of the federal government, but none the less that is what happened and it is happening again in the Meech Lake debates.

Interestingly and ironically, women were told that the override could be a benevolent instrument to relieve against wrongheaded decisions of the Supreme Court. Six years later, in 1987, women were told that the Supreme Court was going to be a benevolent instrument to improve any of the flaws that

were left in the Meech Lake accord. It was a very quick volte-face on the part of political authorities.

Let us turn now to the process of formulating and approving the Meech Lake accord, which exhibits the same features but in a somewhat more virulent form.

It is certainly true that for two years prior to the accord's being drafted, Quebec's five conditions for adhesion to the Constitution Act, 1982, had been clear and the Edmonton conference had dealt with them fully in the public eye. Yet at no time before its signature was a draft of the accord containing clauses 2 and 16, the source of so much concern for women, made public for discussion and comment. I know people tend to laugh at lawyers and their nitpicky ways, but one of the best ways of finding out what a deal is is to look at the way it is written down. We saw the prospectus, if you will, but we did not see the deal until after it was struck.

Effectively then, women were excluded from the runup to the Meech Lake meetings and they never got a chance to comment on what subsequently turned out to be so much trouble. Again, we had meetings with first ministers and officials where the population of women was very sparse. As far as I understand, there was no effort made to have a compensatory complement of people knowledgeable in minority issues at the Meech Lake accord discussions.

Once the accord was made public and women started commenting upon it, we saw measures that were designed to, if not stifle debate, then at least cross it up so thoroughly that it was not going to be very effective.

High on the list of deterrents to real debate is the threat that any change to the accord will make it unravel or fall apart. Women who look for change are portrayed as potential wreckers of Confederation. This has happened no more clearly than when Prime Minister Mulroney endorsed the comments of Lise Bissonette who said that Anglo-Canadian women were a Trojan Horse for the foes of Quebec's enhanced participation in Confederation.

Women's reaction to those comments was very swift, because the women's movement in Canada has for several decades worked both inside and outside Quebec to improve the status of women and women's national organizations have been, I would think, in the forefront of some of the difficult efforts to bridge the gap between English-speaking and French-speaking Canadians. For women's groups to be so insulted was really quite spectacular.

Strongly linked with the portrayal of women critical of Meech Lake is the assertion by the federal government and the special joint committee that Quebec women are the only women whose voices count on the issue of whether the "distinct society" provisions of the accord will have a negative impact on women in Canada. The message sent by Ottawa is, "Quebec women may speak; all others hold your tongues, because the accord is not your business." This, of course, is exactly what happened to big-L Liberal women in 1980 and 1981, but this is potentially much more divisive.

The federal strategy threatens the coalitions between women inside and outside Quebec which have been operating for years in women's organizations, other national citizens' groups and informally, and the reason this has arisen, this choice is being put, is that the federal government and its closest allies among the provinces have said that no woman can be both for Quebec and for women. They have, by their manipulation of the issue, told all

Canadian women, wherever they live, that they must be either for Quebec or for women.

If they are for Quebec, they will drop their complaints about Meech Lake. If they are for women, they will persist with the complaints and run the risk of wrecking Confederation. That is what we are told in order to silence us, and ironically, one of the reasons it works is that grass-roots women in this country have such a strong commitment to a national identity.

The absurdity of the false dichotomy engineered by the federal government becomes clear when we consider what else it is telling women. There is the "Trust us" approach once again. "We really didn't mean to eclipse women's rights and we're sure we didn't." We hear this publicly and in private meetings, but when the government is asked, in the words of Shakespeare, to "make assurance doubly sure" by inserting clarifying language into the accord, it either lapses into this false dichotomy, "Don't ask us to make our assurance concrete; to do so will wreck this fragile bargain," or its other "trust" line surfaces.

This other trust line is new since 1981. This time women are told "Trust them," meaning the Supreme Court of Canada. The joint committee report exemplifies this approach, suggesting that the Supreme Court can smooth out the problems in the Meech Lake accord. The court itself has said in several important charter decisions that it will not give much weight to what the politicians say the charter means, it will go in its own direction. So there is no assurance that the court will put into effect the assurances that politicians give women.

If "Trust us" and "Trust them" does not work, the gloves come off, and this is one of the most disappointing experiences of the Meech Lake debate for women who have made good-faith efforts to participate in constitution-making.

Government authorities controlling the discourse on Meech Lake keep changing the questions women must answer before their concerns will be taken seriously. We are told that the government's experts advise that there are no problems with the accord, yet the expert opinions are never revealed or subjected to public debate. When women respond with expert evidence about the dangers of the accord, the experts are either ignored altogether or flatly contradicted, without reasons.

Yet at times the pretence that there is a legal debate among experts is maintained. Women are told that they will be listened to if it can be shown that there is a problem. I have a faint recollection that I heard this from the Attorney General of Ontario (Mr. Scott) and the Premier of Ontario (Mr. Peterson) earlier this summer. I may have misheard, but it seems to me this was what we were told at that time.

However, as was experienced in the federal hearings, the standard of proof for such a showing is readily manipulated. The accord itself says that section 16 is there to ensure that the "distinct society" clause does not "affect" multiculturalism and aboriginal rights provisions of the charter. But when women show that their equality rights could also be affected by the accord and ask for the same reassurance, they learn that now, to be affected is not enough; women must prove beyond a reasonable doubt that their rights will be overridden. When all else fails, the legal positions put forward by women's advocates are misrepresented, as is the case in the joint committee report. Then, publicly mischaracterized, they are rebutted.

Sometimes the strategy is a little different. When women make legal arguments, they are told that we are dealing here with a political question. Attempts to deal with political issues in political terms calls forth the invocation of statecraft, which only first ministers can understand.

1530

Many commentators will doubtless say in these Ontario hearings, as they have said elsewhere, that the process leading to the signature of the Meech Lake accord was flawed and should not be followed in the future. Their contention is that executive federalism carried to an extreme is no real way to amend a Constitution because it offers no opportunity for consultation on issues of lasting importance. Even the special joint committee recommended changes in the process for the future, although it found no fault with the Quebec round.

I agree with these criticisms and further suggest that the shortcomings of the constitutional process have a particularly serious impact on women and others in the equality-seeking sector, the grass-roots sector, the voluntary sector. My prediction is that the problems already experienced from 1978 to now will be exacerbated if the Meech Lake accord is implemented and particularly if the recommendations of the joint committee are implemented as well.

Let me outline those concerns briefly for you. The accord establishes regular yearly meetings of first ministers and constitutional conferences. They have thus institutionalized the possibility that women and others will have to respond on a regular basis to a fait accompli like the November accord or the Meech Lake accord. There are, at the present time, no satisfactory mechanisms to ensure that there can be adequate public consultation prior to the signing of a deal at a first ministers' meeting, so we will be faced again with the idea that we will unravel a constitutional bargain and things will fall apart if we make protests.

Substantial reforms to the largely in-house, intergovernmental bureaucratic process would be needed to allow for prior public consultation. There is an alternative. Governments can make a real commitment to consulting after the fact and come off the idea that a bargain challenged and criticized publicly, and possibly changed, will unravel Confederation. They have to do one or the other or the process will not work. There cannot be any more of this manipulation by false crisis that has been the hallmark of the Meech Lake process.

Whether there is a commitment to prior or subsequent consultation, there is a further prerequisite to effective consultation. That is, citizens' groups and special constituencies must have resources in order to monitor the process. They are volunteers. If they are in groups at all, their budgets are small and already committed, and making a real contribution to public debate on a year-in, year-out basis will bankrupt them. Particularly, there is a nonmonetary concern that has to be dealt with here. There has to be time for voluntary groups to do the national consensus-building that they must do in-house in order to respond publicly.

One of the things that happened to the national women's groups in the Meech Lake process was that they were not given time prior to the joint committee hearings to do the national consensus-building among the west, central Canada, Quebec, Atlantic Canada and the north that they needed to do to have a sound position. It is remarkable the number of national women's

groups who went forward with the position recommending changes to the accord that had evolved from consultation with their national--including Quebec--members, given that they had only a couple of months to do it.

Part of the strength of Canada's constitutional fabric is that there are hundreds of national voluntary organizations seeking consensus within themselves and mirroring that consensus forward on to the national stage. If you do not allow that sort of backup, as it was not allowed in the Meech Lake process, then you lose valuable, important citizen input.

One of the other difficulties that we face is the joint committee recommendation that there be constitutional oversight by parliamentary committees. They have recommended that provincial Houses also have constitutional oversight committees that would be the counterparts to those at the federal level, feeding into a process that would brief first ministers prior to their meetings. If you add to the requirement of monitoring the first ministers' meetings, the requirement of monitoring that process, you see that voluntary sector faces an impossible task.

The joint committee suggests that the monitoring process will be beneficial and it will help correct mistakes as we find them, but what we have seen in other quarters, in the United States for example, is that the monitoring process may well be retrograde. There were some significant women's rights decisions recently made by the Supreme Court of Canada, and it is chilling to think that we will have to protect them in a parliamentary monitoring process from being put on the conveyor belt to constitutional reform by a House that does not agree with them at the moment.

So the charter oversight functions that are proposed in the accord, in the House of Commons and at the provincial level, will require a real commitment on the part of government to make public participation a reality instead of just a myth.

Let me turn now to the accord and equality rights. As I believe Beverley Baines did, I will address only the issue of section 2 and section 16 in my comments, although I can do questions on the other parts of the accord. I do not want to be understood to be saying that there are no problems with the rest. This is just the focus of concern.

You all probably know section 2 that is proposed to be added to the 1867 act off by heart by now, even after a few days of hearings and meetings, and it is certainly burned into the brains of a number of women's advocates after the past few months. One of the main things that has been impressing itself on women interested in the constitutional process is that one made earlier, in page 4 of my paper. Gains made by women should be regarded as fragile, liable to be reversed without notice or consultation. The gains that were made by women and now face reversal by Meech Lake are the equality guarantees themselves. They did not come into effect until 1982 and 1985, and already in 1987, they face another substantial constitutional counterweight.

You are probably by now broadly familiar with the process that the Supreme Court will go through when assessing whether there is a violation of equality rights. Someone goes forward complaining of the violation under section 15. That person must establish that there has been a difference in treatment between her and other people similarly situate and that this difference has resulted in some harm to her.

There is a lot of confusion in the jurisprudence now because the Supreme

Court has not ruled on what else you have to show. It only heard argument about that in October 1987. But in British Columbia, the Court of Appeal also requires that you show that this harm you have suffered is unreasonable or unfair in the circumstances. If you get through all those hurdles, then the onus shifts to the government to justify the legislation under section 1 of the charter, and under section 1 there is a very thorough inquiry by the court and you see the range of subjects that the court looks at, starting on page 20.

It looks at the purpose of the law, its effects on the individual and whether the effects are proportionate to the worthiness of the purpose. They will not let an individual suffer inordinate harm to support a frail constitutional purpose. They balance the two.

In looking at whether the object of this particular legislation is constitutionally worthy or not, the Chief Justice has said they will look at "the character and the larger objects of the charter itself, the language chosen to articulate the specific right or freedom, the historical origins of the concepts enshrined and"--this next one is very important as far as Meech Lake is concerned--"where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter."

So you do not just look at equality rights or the purpose of a particular law; you look at the whole constitutional system, what impinges on equality rights. You make your decision about whether equality rights have been violated on the basis of what else is going on in the Constitution.

Women see now section 2 is going on in the Constitution and there are several ways in which. It is like Tuzo Wilson's great theory of plate tectonics: these sections of the charter will sort of move around and bump into one another, and the moving around and the bumping into one another is what women are concerned about.

Now we get into some sort of technical heavy weather here. When you look at the analysis that you do under the charter, there are several ways in which the distinct society or linguistic duality clause is going to have an impact on that analysis. Looking first at section 15, you see that this is where the plate tectonics comes in. The separate school funding reference has said, "The charter does not render unconstitutional a distinction that is expressly permitted by another part of the Constitution." So there has been a great debate about whether section 2 actually allows a distinction in favour of linguistic duality and the distinct society, or whether it is just a canon of interpretation.

Peter Hogg says it does not allow a distinction. Other people say that it does. The debate goes on. But there is at least some possibility that this general principle enunciated in Bill 30 may be brought to bear on that issue of section 15 versus section 2.

But even if it is not brought to bear, you still have this overall issue that equality rights may well be looked at in light of what else is going on in the charter. Particularly if the Supreme Court adopts the analysis that British Columbia has come out with in its Court of Appeal, you say, for example, that a particular law treats you differently and harms you and then the court asks you to prove that it is unreasonable or unfair that it does so. The court may well then say it is not unreasonable and it is not unfair

because it impinges on your equality in the interests of the distinct society, so it is not unfair.

If the Supreme Court of Canada adopts the BC approach, then section 2 has a very clear pathway into section 15 analysis. Even if it does not, there will always be an entrée for section 2 when you get to section 1, the great constitutional balancing act. I have put on page 22 what I think has happened to section 1 of the charter as a result of the Meech Lake accord. It has been rewritten and it has been rewritten as if it looks now like this:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society committed to linguistic duality and the promotion of Quebec's distinct society." I think everything will be evaluated on the basis of that clause now, instead of on the basis of what section 1 now says.

The joint committee in its report took the position that there was really nothing to get alarmed about here; it is just constitutional analysis as it always has been, the same old pop-stand business as usual and we do not have to worry about section 2 having any more impact on section 15 than any of the other sections in the charter that are already there and make an impact on it.

I am trying to help my grade 4 nine-year-old understand some basic math at this point and I think that her workbook might usefully have been sent to the joint committee, because the simple mathematical fact is that a right qualified by a certain number of factors becomes more qualified when more factors are added to the pool of qualifiers. So that if you have a basic right now qualified by its possible collision with six things and you add to that a seventh thing, the right is more qualified than it was before.

Progressive addition of more qualifications on equality rights will dilute them, even if it does not change the basic analysis applied to charter questions. So there is mathematics. There is also weight. Look at the weight that the court will give the "distinct society/linguistic duality" clause. Look at the weight that governments have already given it. They have said: "This is make it or break it for Quebec in Confederation. This is a signal matter of nation-building." Those comments will not be lost on judges. Even judges 25 years from now will have those comments in the historical record, which is now almost always filed in constitutional cases.

In the Bill 30 case itself the Supreme Court of Canada was very inclined to give significant weight to what it styled a fundamental constitutional compromise. So not only have the framers of Meech Lake added another factor that is going to collide with section 15, they have added a factor of significant constitutional weight.

There is one last little point here. It is that they also put in section 16 of the accord, and in the face of that clause, their argument that section 2 adds no new threat to existing rights breaks down. Why did they put it in if existing rights are not threatened and if they did not want to safeguard some existing rights from the impact of section 2?

There really has never been a satisfactory explanation for protecting aboriginal and multicultural provisions from the reach of section 2 and not protecting equality rights. All of the explanations break down at some point. We are told, "Oh, well, they are put in there because multicultural guarantees

are interpretative provisions, like section 2, and therefore we have to protect them." But the aboriginal guarantees that are included in section 16 are matters of substance, not interpretation, so that rationale breaks down.

Then we have the wonderful illogic of the special joint committee, and I have set it out on page 24. They say, "Many of the constitutional experts that appeared before us testified that section 16 is unnecessary," and you have probably heard that too. "Certainly it generates more heat than light. Adding section 28 of the charter to it would accomplish little because section 28 only guarantees equal application to men and women of rights and freedoms referred to elsewhere in the charter." I think that differs from what the evidence before your committee has been about section 28. "But reaching into section 15 of the charter to add gender equality rights"--actually to make it mean something--"to the 'protected list' while leaving all other charter rights 'unprotected' would be"--this is my favourite phrase in the report--"even more arbitrary." Implicit in the use of the phrase "even more arbitrary" is the acknowledgement that section 16 is already pretty arbitrary as it stands.

The potential for mischief inherent in section 2 of the accord can be illustrated by an example. Now, I know Professor Baines did not want to give you an example and I offer this one with enormous diffidence because I have been through this example wringer several times, and the treatment accorded examples in the summer of 1987 round of Meech Lake accord discussions is pretty sobering.

Women were told that, without examples of what could go wrong, women's arguments were unconvincing. If examples were offered about what could go wrong, women were described as racist, unrealistic or anti-Quebec if they contemplated any legislation by Quebec that put the distinct society ahead of women's interests. If they suggested that any other government could put linguistic duality ahead of women's interests, the examples were styled as speculative or absurd because the prospect of any government doing anything unconstitutional was remote.

Responses like these ignore Canadian history. Governments in this country have all from time to time done things which courts have found to be unconstitutional. They also ignore the essential nature of an example. It is by definition speculative because the events in it have not happened. Criticizing women's examples for being examples is the height of constitutional doublespeak, and we got to be pretty familiar with that.

The present example, I hope, will remove some of this speculative business, this "governments do not act like this" approach, because it is drawn from an existing government program that is now facing constitutional challenge under the charter. This is a federal program sponsored by Employment and Immigration Canada. It provides subsidized language training for recently arrived immigrants, giving tuition subsidies and living allowances to qualified persons so that they can learn one of the official languages.

1550

Women are effectively precluded from receiving living allowances in a large number of cases by several rules in this program. One of the disqualifications is that no sponsored immigrant can receive language training, and most of the sponsored immigrants are women.

Another rule says that the subsidies go to labour-destined immigrants, but only one person in a couple can qualify in spite of the reality that most immigrant couples have to have both people in the workforce in order to get started. The people who are usually picked are the men in the family.

Third, subsidy is not available if language training is not needed for entry to the labour market, and so women who can go into job ghettos--cleaning buildings, working sewing machines, doing light manufacturing--where they can work with people from their own country in their own language are disqualified from learning English or French because they do not need to.

There are a number of local and national women's groups that are now doing the community organizing necessary to bring a charter challenge to this program.

But assume for a moment that the government of Quebec were to exercise the powers given to it under the Meech Lake accord itself to take over the integration of immigrants into Quebec society. They are allowed to do that, and all it takes, according to Meech Lake, is an agreement. Assume as well that Quebec were to leave most of the elements of this present language training policy as they stand. So we have the possibility that there would be a federal program and a Quebec program that have the same elements. We also have the possibility that women could bring charter challenges to both of those programs.

So what is going to happen? The Quebec government could justify its program on the basis of the "distinct society" clause because promoting the integration of immigrants into Quebec society and their learning of French enhances the distinct society. The federal government could defend its program only on the basis of linguistic duality because integrating immigrants into the two official language groups does preserve linguistic duality. So would there be two separate court rulings on essentially similar programs? And how will the court sort out whether the linguistic duality clause has greater strength than the "distinct society" clause or not?

What if the Quebec program were upheld by the Supreme Court of Canada on the basis of the "distinct society" aspect of its defence and then the federal program came to the same court? Would the matter be regarded as determined, or could there be a different decision about the same program? What if it were decided that one of these programs violates women's equality rights and one does not? Where does that leave us?

The hypothetical highlights, I hope, an important issue that is almost always ignored in the discussion of the Meech Lake accord: that is, that the Supreme Court of Canada is still the final court of appeal for all of Canada, including Quebec. Cases from Quebec dealing with conflicts between sex equality and the distinct society will, once decided by our highest court, be in our jurisprudence for citation in other sex equality cases arising in other parts of Canada.

It is thus not at all true, even as a technical matter, to say that the relation between sex equality and the distinct society is a domestic matter for Quebec only. As long as the Supreme Court is the highest court in Canada, its jurisprudence on matters arising inside and outside of Quebec affects us all. We have seen in the court's recent pronouncements that its judgements make philosophical and value statements, they do not simply reach conclusions. The judgement of last week that has been so widely reported in the press is a classic example of that.

It will not help the women of Canada to have from the Supreme Court a clearly articulated statement that the interests of women must be subordinate to those of their national or linguistic group, because in a pluralistic society with many national and linguistic groupings and strong constitutional and accord protection for multicultural values, such a statement will not be confined to Quebec.

I will end on a historical note. It is not all that historical; it is only 1974. The Supreme Court of Canada faced the question of whether a woman's equality interests should prevail over the interests of the group of which she was a member. The case of Attorney General of Canada versus Lavell is a very famous constitutional decision. Indian women challenged the statutory removal from them of their Indian status when they married non-Indian males. The majority of the court ruled against the women's equality argument, saying that constitutional jurisdiction over Indians gave the federal government the right to impose requirements for having or keeping Indian status that discriminate against women.

That the Bedard and Lavell case is about the conflict between sex equality rights and one type of distinct society is clear from Justice Laskin's description of the argument in the case, and I set it out:

"It was urged, in reliance in part on history, that the discrimination...is based upon a reasonable classification of Indians as a race, that the Indian Act reflects this classification, and that the paramount purpose of the act to preserve and protect the members of the race is promoted by the statutory preference for Indian men."

That was the successful line of argument in the Bedard and Lavell case. It is widely recognized by jurists and constitutional scholars that the language of section 15 of the charter was designed to prevent a repetition of the unfortunate reasoning of the Bedard and Lavell case. That has been recognized by almost every constitutional scholar to comment on section 15, and it has been accepted in a lot of the Court of Appeal decisions to deal with the terms. Now, only two years after section 15 comes into force, women contemplating the Meech Lake accord are wondering whether the wheel has come full circle.

Mr. Chairman: Thank you very much. I think it is safe to say that we will have a period of questions, but you have put a great deal into that paper and I know we are going to be reflecting on many of those points for some time to come. We really appreciate the effort that undoubtedly went into that overview of many aspects of constitution-making.

Just before we go to questions, one observation is that perhaps a recommendation we need to make is that first ministers not be allowed to meet between midnight and breakfast. It seems from the examples you have been able to relate that that could lead us into all sorts of difficulties, and that might be one place to start.

Mr. Cordiano: Professor Eberts, thank you for your presentation. There is certainly a lot to think about in it, and we cannot possibly talk about all the issues; at least, I will not. I am going to deal specifically with your remarks on section 16.

I understand that the premise or the thesis you are putting forward is that there is a balance in the Constitution between conflicting sections, if you will, that equality provisions in the Constitution have to be balanced

against other sections in the Constitution and that this is how the courts will look on decisions. In trying to make decisions, they will refer back to sections with regard to that and, as you put forward, I believe, section 16 adds one other dimension to that balancing act.

First, I would just like to talk a little bit about what Professor Baines said to us the other day in her submission. She put forward the notion that women form a distinct culture. That was her premise. I take from that that women can be considered a distinct culture or a cultural grouping, that there is a common set of cultural values, if you will, that women share. Would you agree with what she was saying the other day along those lines?

Ms. Eberts: I think her argument has a lot to recommend it. Scholarship over the past 25 years, which is about the lifespan of scholarship on women's issues in the academy, has shown that women may have a different way of approaching moral issues. Carol Gilligan from Harvard has said that. Certainly the historical work that is being done on women in Canada and North America shows that women's institutions have played an extremely important part in the preservation and the enhancement of such equality as women have managed to get.

Because the scholarship is so recently on the scene, I do not know that we really yet fully understand all of its dimensions, but I think Professor Baines is certainly on a track that sounds to me very interesting and logical.

1600

Mr. Cordiano: When I look at section 27 of the charter--and, of course, section 16 refers back to section 27 of the charter and brings it into the Meech Lake accord--I am looking at what that means: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." I think that means all Canadians, whether French, English, men, women, whatever part of the world you come from, so that would include all Canadians.

Having said that, I would think that section 16, as a result of that, draws women into the accord because it refers to all Canadians, any cultural background, any heritage, and that would include women. Do you follow what I am saying? I think there is some merit to the argument that, in fact, women can be considered a cultural group. If that is the case, section 16 specifically refers back to section 27 and draws women into the accord as well.

Ms. Eberts: I think your observation, for me, falls into the category of, "Wouldn't it be nice if that were the case?" Lots of suggestions about how to protect women's interests now do that, but I fear I must add a cautionary note about the guarantees of section 27. One of the reasons for seeking to have section 28 included in the Charter of Rights was in fact that section 27 had been included in the Charter of Rights. That much is clear from the resolutions of the ad hoc conference in February 1981.

The concern that motivated women at that time and caused them to want an affirmation that charter rights are equally available to male and female persons was the concern that, in some of the cultures represented in Canada, the position of women is traditionally or historically subordinate to the position of men. We have not yet, I suppose, seen the full tuning in to egalitarian Canadian values there. I think you can appreciate that women are somewhat leery of the section 27 guarantees because of the fear that they may be used to affirm discriminatory elements, not to protect women.

I can give you one example, although every time I give an example, I quail. When the Principal Group Inc. financial scandal broke out west, you remember reading in the paper about all of the large religious communities there who had invested and lost money. The Report on Business stories about those communities indicated that the management of all the financial and administrative business of those communities was in the hands of their male elders. Women played no part in the administration of those large communal enterprises. I think it is that type of multicultural heritage, if you will, that women had in mind when they were worried about the affirmation of multicultural heritage in the charter.

By this, I am not saying that all people who have a multicultural heritage are sexist. I do not want to be taken to understand that, but I am saying that was a concern. I do not to put all of my constitutional eggs in the section 27 basket.

Mr. Cordiano: But if you agree with the definition of multiculturalism as including a woman's culture, then that is very different from what you are speaking to. If multiculturalism includes all Canadians, then that means every Canadian and in different cultural groupings, and you can ascribe to a woman's culture, if you will, under a multicultural definition that is all-encompassing.

It does not speak to identifying one cultural group and saying it has discriminatory practices. That is the only point that I am making. You can point to that and say, "We do have a woman's cultural grouping that is very different from another cultural grouping." That too has to be considered as a very plausible cultural group.

Ms. Eberts: I have not ruled it out as an argument that even I might make some time in a constitutional case, but I do not know that I would regard it as the rock upon which I would like to build my church.

Mr. Cordiano: In the light of the fact that we are referring to section 16, I think that point can be made. Certainly I know that the multicultural groups will say that section 16 does nothing to advance their cause.

Ms. Eberts: That is indeed what they say.

Mr. Cordiano: Therefore, I do not know that they want to put all their eggs in that basket either. All I am saying is that section 16 brings that grouping or that section of the charter into the accord. Consequently, if you follow what Professor Baines was saying, that there is a hierarchy of rights, we are lifting that point up to section 16 as well, that women can be included in that section.

Mr. Breaugh: I appreciate the kind of controlled anger that I saw here this afternoon. But then I have seen you under fire before, so I anticipated that. One of the things that Professor Baines suggested the other day as being useful for us would be to assist in the preparation of some kind of a reference which might sort out all these wonderful opinions that we have been hearing. Does that strike you as being a reasonable approach for a committee like this to take, to try to gather as much expert legal testimony as we can on the record and then, in the end, make our own judgement call and perhaps then do a reference to see if we can get some final word on it?

Ms. Eberts: I think, just as a practical matter at the provincial

level, your reference would be from the government to the Ontario Court of Appeal. You might have a time problem, given the deadline for affirmation of the charter, by the time it goes from the provincial Court of Appeal to the Supreme Court of Canada. I understand there are two time lines. One is the outside limit and the other is the practical time line that is even sooner than 1990, and I do not think a reference fits into that.

If you are considering that option, you would have to give very serious consideration to the question of what questions you would refer, because certainly the experience of women's advocates over the summer was that you could never tell which shell the pea was really under. The question always changed, and you could find for political purposes that you would frame a series of questions and you would get a very nice decision from the Supreme Court of Canada, and then it would be decided that those questions were not the right questions. So any reference that went to the Supreme Court of Canada, I would think, would have to have multi-party agreement as to what the questions were, which in itself is a large act of political engineering.

Then there is the issue, from the point of view of equality-seeking groups, of who would be allowed to argue in the reference case. Certainly all the attorneys general would be present, but there are a lot of groups that would like to go and make arguments about the meaning of the Meech Lake accord, if only to have the Supreme Court tell them that their arguments were terrible. The list is likely to be so long that the Supreme Court would be in great distress because of such a reference.

Ideally, there would have to be discussions between the political authorities and groups and constituencies outside regular political channels to see if they could be lined up and the people sorted out whom everybody would recognize as having a right to argue in the reference. That, too, is very political. It is not just a cut-and-dried legal question, just as the 1981 constitutional reference that led to the November accord was not a cut-and-dried legal question.

1610

Mr. Breaugh: One of the things we are trying to--as you are aware, we have a bit of a political problem of our own in that the Premier (Mr. Peterson) has said, "You can do whatever you want, but there will be no amendments." This is not a usual situation for us to find ourselves in, so we are kind of groping around. If we cannot move amendments, what can we do? What could a legislative committee put in place in the way of recommendations that might assist the process that most of us see as being badly flawed, if not quite morally reprehensible?

So we are groping for what we could do that would be positive in nature, that would assist people, that would put on the record all of this opinion in a formal way so that people could then have their subsequent arguments. The reference seems to me to be one approach that I would not like to rule out just yet, although you point out that it is not quite as easy as it might first appear to be.

You mentioned in your presentation that there will be what I read as being an attempt by the federal committees to aid the process on down the line, that legislative committees would do that. You point out, I think quite rightly, that this may in fact make the process worse. It all depends on how people go about that.

Let me put it this way. If this committee wanted to say, "To hell with

everybody, we will put an amendment," one of the first major problems we would have is how in the world we would word an amendment. Where would we turn to get such advice? How would we go through a consensus-building process? So that for now, we may get to a conclusion at the end of this process that we are not in a position to do that, but we had better get ourselves in a position to be able to do that the next time around. How do we get from here to there?

Ms. Eberts: I think you will find, when you hear from the community groups that will come and talk about the Meech Lake accord, that there is presently on the table a relatively limited range of suggested solutions to the section 2-section 16 problem. One of those is that an amendment be moved clearly making the accord subject to the charter. That is the mega solution.

Then moving down from that is the recommendation that section 15 and section 28 of the charter be included in section 16 of the accord. Moving one step down from that is the recommendation that section 28 be included in the ??accord. That is the option that does have the support of the women's groups inside Quebec; at least they have said they will not oppose that in the interests of comity with English-Canadian women.

I think those are your three options, and you will doubtless hear comment from the community groups about which of those options you should recommend.

As to the rest of the process, I think that this committee has a marvellous opportunity to correct the record that was left after the federal hearings. A comparison of the transcripts at the joint committee and the report of the joint committee reveals several significant discrepancies between what was told to the committee and what they said was told to the committee. The fact of life of constitutional litigation now is that all these reports will one day be sitting in front of the justices of the Supreme Court of Canada. So this committee can correct the record and report fairly on what is said about the concerns and would thereby be doing an enormous service to those concerned with this process.

To go further than that, you have the opportunity to recommend changes in two areas. One is within the government's own intergovernmental process itself. I understand you have had some submissions from the Ministry of Intergovernmental Affairs and I know that there is experience on this committee in that area, including such things as building into the Intergovernmental Affairs' bureaucratic process some consultation with community groups, the concept of advisory panels or councils.

Ontario has always had one sort of advisory committee or another on Confederation. Those could be reactivated and made much more an early part of the process. There could be a commitment on the part of the government to having differently constituted official delegations at intergovernmental meetings. That is all in-house. Then you could give some attention to your own legislative process about how you would prepare for first ministers' meetings and what oversight you would exercise over the bureaucracy and the Intergovernmental Affairs' process.

Lastly, the thing that legislatures always hate you to talk about, you could talk about money. You could talk about giving groups who have a demonstrated commitment to the constitutional process the wherewithal to be steady participants in it.

I know from the organizations that I am familiar with how very difficult

it was to mount any sort of effective showing in the summer, yet what miracles were performed. But you cannot run a country on miracles, as much as some people think you can.

Mr. Breaugh: Oh, ye of little faith.

Mr. Chairman: We will leave Mike with his faith and move on.

Mr. Offer: I would like to continue on in the line of questioning Mr. Breaugh has initiated with respect to process.

With respect to your submission, you have indicated two concerns with respect to the joint committee's recommendations on process. The way I read your concerns they are: How are you going to monitor submissions to first ministers' conferences? Second is the whole question of this new monitoring process. How are you, how are other groups going to be able to plug in to the able to share their insight, their feelings and their positions when they have these two new processes?

I have just heard the answer to Mr. Breaugh's question which was a suggestion as to how the process could be improved. I think you have also indicated that there is a role that we could play here at the Legislature. My first question is, could expand you upon how, in your opinion, we might be able to suggest a process which might meet some of the concerns that you clearly indicate in your submission?

Second, in doing that, what would be the position of having all these new legislative committees and the two federal committees, one monitoring, and how might that in a perverse sort of way hinder what you have recommended? I am just trying to get a handle on what you feel is absolutely, in your opinion, at today's date the best type of process you could see.

Ms. Eberts: Let me start with the end of your question first, the part about how some of these various recommendations might work against one another and hinder each other.

In the long run, if you have several consultative processes going at the federal level, in the provincial bureaucracy and in the provincial Legislative Assembly, and if those are real consultative processes, the net effect of those will be to slow the pace of constitutional change. That is not necessarily a bad thing. I think other witnesses have said, and certainly Peter Hogg has written, that a constitution is not necessarily something that you change every year.

There has been a bit of a tendency in the Meech Lake accord recommendations and in the joint committee recommendations to treat the Constitution like a collective agreement, and it comes up for renegotiation every year or as under some joint labour-management committee review, with various articles that have caused trouble being reported up to the bargaining team every year.

1620

To treat the Constitution like a collective agreement really worries me a lot. I do not see any hindrance to the constitutional process if you put in safeguards that require broader consultation and those safeguards slow the process down. That is exactly what should be happening. We should not have people going every year and signing deals that then go into the Constitution without a chance for public consultation.

The nature of constitutional change and the nature of constitutional jurisprudence is that it slows the pace of change; it does not hasten the pace of change. People complain about that, but if you consider what Peter Russell just said about the fashions that go through the Supreme Court of the United States or the Supreme Court of Canada, what would happen if you had those changing fashions on a cycle every year. It would be disastrous. You do have to have a slower constitutional process.

Once you admit that and say you can have a relatively slow constitutional process, then I do not think there is anything fundamentally wrong with requiring that it be very consultative. One really important thing that provincial legislatures can do is to have accepted as a convention of the local legislature and local government the idea that the Premier will not go off and sign deals relying solely on his majority in the House to get them through, without discussing them first with the caucus and with the Legislature. The Legislature would have as much right, if not more, to be consulted in advance about these propositions as citizens do.

It is a problem of executive federalism that we are looking at here and a legislature, and particularly a caucus in a majority situation, has that critical role to play in making sure that government is, in the old Baldwin-esque term, responsible government.

Mr. Breagh: She is advocating democracy here. Give me a break.

Mr. Chairman: Revolutionary.

Ms. Eberts: I knew I would get into trouble if I said that.

Mr. Allen: We seem to be not entirely retreating but in a sense retreating into process discussion, and I am not unhappy about that because the process has not been good. I am not unhappy about that because Ms. Eberts has made some very good recommendations and has strengthened some notions that have been going around the committee about some things we need to do in the future in order to improve the process. I think that is all well and good.

I do not know whether it is because it is after four o'clock already and we are at the third day of our first week of hearings and our minds are turning to spaghetti from constitutional consideration already, but oddly enough, we have not grappled with the central point you have making, I think, about the problem of women, equality, the Constitution, the charter and the accord.

I regret that we are at the time that we are at because at this point there are obviously some very difficult questions you are putting before us, both at the level of interpreting what has happened already in the process in that respect and also with respect to the issues themselves substantively.

I am sure other members of the committee, like myself, are trying to get their heads around the significance of section 16 in the accord, whether section 28 in the charter has monumental consequence or not, whether the "notwithstanding" in front of the clause wipes out everything else, all the other "notwithstanding," or whether it does not, whether in the interplay of all parts of the Constitution with all other parts of the Constitution, as you put it, as sort of a play of the tectonic plates, somehow or other section 28 gets lost or reduced or does not, or whether the charter has in its own right a kind of paramouncy among the tectonic plates. Those are all big, big questions, and I do not suppose by asking you a few more diddley questions I am going to get much further on that this afternoon.

The other level of the question that has come out this afternoon appears to me to be a question of analogies, whether it is possible to take a judicial decision around native culture and equality rights that somehow wing in from another direction in on that culture impacted and force some kind of resolution. Whether you can take the analogy of what happens in a court decision there and transplant it into the Quebec case and the Quebec round is obviously a nice question. We all know analogies are never perfect. You, as a lawyer, would not want to press them to the nth degree in any of your arguments.

Likewise, with respect to other cultural entities such as Hutterites in Alberta and investments and what happens in other legal cases, again, and I question it, obviously, this sort of paternalism and patriarchalism that resides in both those issues is a major problem for us. It also is evident in both our English cultures in general and our French culture in general and has been in the past, so there is a problem there that has a certain resonance.

Alongside that, there are also certain important and unique elements that are quite different in the Quebec case. Among them is something that I would have thought would have been of some consequence to women in Canada, and that is that at least, on balance, there seems to have been a somewhat better forwarding of women's concerns in the Quebec context than in other parts of the country. If that is the case, then all the other questions to one side, is there not, on balance, something particularly useful to women in Canada to have that aspect of the "distinct society" affirmed in this process and available therefore in the rest of the battle.

That is a long sort of preamble statement plus an observation. I want a reaction on the last point in particular, and maybe you can come back and give us some more about some of the other stuff.

Ms. Eberts: One thing did occur to me as you were talking about the jurisprudence and analogies and so on. The Supreme Court of Canada has heard argument in the first case dealing with equality rights. They heard it in October 1987 and it is just a matter of time before they make some pronouncement about the plate tectonics, how section 15 relates to certain other sections and relates to section 1 and what section 15 means.

They will not say anything about section 28, because it did not surface in that case. But one of the things that is really very regrettable about the haste with which this process is being driven forward is that we are going to miss by a few months the Supreme Court's clarification of what equality rights are, if we stick to the de facto timetable that has been bruited about of trying to get the accord approved by the summer of 1988 or whatever, because the court may well come out with its equality decision in the fall of 1988, and then one of the big questions marks will be removed.

I do not foresee a case dealing with section 28 coming to the court that quickly, but I do know that on March 3, 1988, there will be argued a major constitutional case involving the relationship between sex equality and freedom of speech--more plate tectonics--and section 1. That is a case that has attracted a lot of attention in the women's movement and some of the best women legal scholars in Canada and the United States are presenting briefs to the court on that.

Again, haste in this process will miss by a few months the Supreme Court's clarification in a major constitutional case of some of some of those issues. That is a process concern, but it has a really strong bearing on substance.

1630

As far as Quebec women are concerned, it has been very interesting to us, struggling on for women's rights outside of Quebec, to note, ver the 1970s and 1980s the enormous progress that Quebec women have made. They have been in a number of respects leaders for other women in Canada. People in the English-speaking provinces have had a bit of a schizophrenic approach to the federal jurisdiction. In some provinces the only way you could get any action at all on equality rights or measures of interest to women was through the federal jurisdiction; yet, because of loyalties to their own province, women were not willing to be really centralist once and for all. So there is that issue.

While I laud the progress made in Quebec and while I recognize it fully, the statement of political consciousness by Quebec women that the "distinct society" is a nonsexist society, I do remember, as a student of history, that Quebec women got the vote in 1940. Quebec women got to be called to the bar in 1940. They got to be called to the bar in Ontario in 1898. These things, like fashions in traditional decision-making, come and go. I hope that we never see a reversal of the trend in any province, away from the wonderful strides that have been made in Quebec.

I am talking about eggs in baskets and rocks upon which one builds churches and this sort of thing, and we are talking about a Constitution which is supposed to be some hedge against the politically transitory. I think we have to bear that in mind, while honouring the other traditions.

Mr. Chairman: Mr. Eves, Miss Roberts, and I think, if there is no one else, that would be the end of the questioning.

Mr. Eves: I just had one small point to try to clarify or ask your opinion on, actually.

On page 24 of your presentation, you are talking about your favourite term, "even more arbitrary." As I was reading that, I circled it and it brought to mind the presentation by Professor Baines yesterday. On page 22 and the top of page 23 in her presentation, she states that "...the starting point must be the inclusion of section 28 in the accord." She goes on to say, "However, I find it difficult to stop with the inclusion of section 28 because I have researched the recent section 28 jurisprudence only to find that the courts consistently read section 28 along with section 15 and with other sections of the charter."

She goes on to put forward the suggestion that "if caution is the key to the accord, and Professor Hogg's analysis of section 16 would suggest that it is, then we must include not only section 28, but also the rest of the charter."

What is your comment on that proposal?

Ms. Eberts: By picking up one end of a ball of string and following it through, you do get back to this position. That is the reason there are three alternatives stacked up, because advocates, for example, of effective multicultural rights say you cannot have effective multicultural rights with only section 27 and section 16. You have to have section 15, because that gives you your substantive protections against distinctions on the basis of race, national origin and so on.

Then you have the advocates of other things, like free speech, which are

affected by language guarantees, saying, "Why stop at section 15?" I think that the only basis upon which I can suggest limiting the rollback at section 15 and section 28 is the notion that section 15 of the charter is the only part of the charter that explicitly deals with egalitarian rights. They are so closely allied to sections 27 and 28 that they can be seen as a package. Egalitarian rights are in the charter itself made distinct from political and legal rights. It is maybe a formal distinction, but that is at least the way the charter itself organizes them. It seems to make some sense that, instead of splitting up the egalitarian rights themselves, you keep all those together and reserve for a subsequent occasion the issue of what to do with political and legal rights.

That being said, my own hope would be that, either by means of a constitutional instrument or by means of judicial interpretation, the charter will be seen to be pre-eminent over most of the rest of the Constitution.

Mr. Eves: My point was that if this committee were even remotely to entertain the possibility of a suggested amendment, it just struck me as I was listening to Professor Baines yesterday that that might indeed be a rather simple, clean-cut, all-encompassing amendment. I just wondered about your thought on that.

Ms. Eberts: That is the great selling point of that amendment. It is elegant.

Mr. Allen: May I just ask a brief supplementary? If the courts affirm the paramouncy of the charter, is not the simplest amendment, from everybody's point of view, simply to strike out section 16 of the Meech Lake accord?

Ms. Eberts: But they have not affirmed the paramouncy of the charter.

Mr. Allen: No, but I--yes, yet.

Ms. Eberts: No one will know, before you have to make your decision, whether they will affirm the paramouncy of the charter. Scholars will be fighting for years about what exactly was done in the Bill 30 case. Nobody agrees on what was done there. Nobody can figure out for sure whether that made the Constitution supreme over the charter. We are not going to get a quick solution to that.

Mr. Allen: But it was just a general view that seemed to emerge among many of the scholars who were here that section 16 really was not necessary, anyhow. I gather that multicultural groups are not all that enchanted and one cannot really see that it did a lot for aboriginal groups.

Ms. Eberts: The problem with it is that it may not have been necessary, but once it is there, you run into that canon of interpretation that every provision in a legislative instrument is supposed to be given a meaning. Once it is there, it has to be given a meaning, and it will be.

Miss Roberts: My comment will be very brief, in contradiction to what I am going to talk about. That is the haste in which things have been done and which you commented on so clearly.

My concern is most likely similar to yours, that there are many things to be decided by the Supreme Court with respect to the charter of 1982. We are

faced with a decision now that has to be made. It is imperative that we make the decision one way or the other; whether we decide to amend it or what we do, decisions have to be made.

Just indicate to us, if you would, even though we do have consultation with all the groups you have suggested and many more we can think of, I am sure, what happens in the future when it is presented to the executive or to those people who are going to decide, and what is going to occur once they get together again?

Perhaps one of the easy ways of dealing with it would be to determine that those executive meetings not be in private, that they be in public, so that the discussions be heard and that each person is held accountable to whatever extent it is. Most likely, if that had happened in this particular case, people would be sure of the intent and the reasons and what had been discussed in the background. It is just a suggestion; I am sure it will be helpful if, in the future, we are going to make some changes, that those changes can deal not only with this, but we can also suggest what happens at the other end.

Ms. Eberts: During my brief stint as a baby bureaucrat in the federal-provincial affairs secretariat, I was far too lowly ever to go on one of these federal-provincial conferences. I understand even the ones that are televised have a lot of corridor discussion and backroom chat. You cannot keep people from meeting in people's hotel rooms or the kitchens of their suites, and so on.

I think televising the meetings would add a certain useful amount of sunshine to the process. But the federal concession to the provinces of jurisdiction over marriage and divorce was done at a public meeting. It was the most bizarre thing that had come along in ages. Who knows what the backdrop to that was? I think the openness of the meetings is part of an overall package of making the executive more responsive to other concerns. I think it is very important, but I do not think it is the only thing that needs to be done.

Mr. Chairman: Mr. Morin wanted a quick question.

Mr. Morin: Possibly the last question too. We have heard from other witnesses about the importance of national reconciliation. What is your assessment of the need to bring Quebec back into the constitutional fold?

Ms. Eberts: I am a person who has been for a long time firmly committed to federalism and very interested in having Quebec as a partner in Confederation. I am concerned that the Meech Lake accord and the free trade initiative are happening at the same time, because I think that while the federal government may believe the Meech Lake accord and the free trade initiative will have an overall binding effect on Confederation and keep Quebec in Confederation, there is a real possibility that it could have a centrifugal effect; that is, if the Meech Lake accord brings about a more decentralized, more loosely knit federation, a more porous society, and if the free trade agreement makes it not as necessary for any province to go through the federal structure to have access to other markets, then the utility to Quebec of Confederation may be reduced.

I say this somewhat tentatively, but the fact that both of these initiatives are going forward at the same time worries me greatly. I think that any benefit one sees from the Meech Lake accord may well be lost because of free trade. Certainly, Mr. Parizeau has lost no time in coming forward with

some fairly marked statements about what an independent Quebec would do. I am very concerned about that.

Mr. Morin: Do you mean to say that the accord will not unify Canada?

Ms. Eberts: I think there will be a short-run, symbolic and quite important sort of gesture of national reconciliation but that we have to be as careful as we can to look five years down the road and see what the actual working out of the mechanisms that are in there will do.

Mr. Morin: In free trade.

Ms. Eberts: It is very difficult.

Mrs. Fawcett: I am not quite clear. Would you be recommending that we reject this and start over again or that we amend it?

Ms. Eberts: My preference would be for an amendment. Just think, women constitutional activists have always taken a positive approach to these things. When we were doing constitutional reform in 1980-81, we said, "Let us not make entrenchment an issue; let us just talk about what should be there." Similarly here, at the joint committee hearings, there was the uniform approach on the part of women's groups, "Let us not make an issue of the question of whether there should be Meech Lake or not." Most of them said: "How wonderful Quebec is accepting to be a formal part of Confederation. Let us talk about the sequel to that and how we can protect the interests that are not protected well now."

I think another option, short of rejection, is delay, but that is something the political ramifications of which I have not really explored.

Mr. Chairman: Professor Eberts, we are very grateful for not only the paper but also the answers to our questions. The Quakers have a term about seeking a way, that the truth is not something that is just sitting there, that there are a number of routes we may follow. I think that at the end of this first week of hearings our minds are certainly full of many thoughts and many ideas.

One of the important aspects of the process that we are in right now, and perhaps it is important to state at the end of this week, is that ideas and time can have a way of bringing about new ideas and new relationships. I think we have felt as a committee that it is awfully important that we not reject out of hand where perhaps some of those ideas may lead us.

Obviously and frankly--and I would not want to mislead you or anyone else--there are outside this room some realities which at some point in time we as individuals, as members of particular political parties, are going to have to grapple with. But as we go through this process, I think we have an obligation to our oath as legislators, an obligation to the motion which set us up, to explore these ideas and to explore these ways. I think you have presented to us this afternoon a great deal of food for thought, which we will take with us and think long and hard about. Again, we are most appreciative for your coming today.

Ms. Eberts: I thank you all for your thoughtful and very considerate questions and attention. It has been a very positive experience.

Mr. Chairman: Thank you.

The committee adjourned at 4:47 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

TUESDAY, FEBRUARY 16, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Sterling, Norman W. (Carleton PC) for Mr. Harris

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

Witnesses:

From the Legislative Assembly of the Northwest Territories:

Kakwi, Hon. Stephen, Minister of Aboriginal Rights and Constitutional
Development; MLA for Sahtu

Richard, Ted, MLA for Yellowknife North

Funston, Bernard, Head of Constitutional Law, Ministry of Intergovernmental
Affairs

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Tuesday, February 16, 1988

The committee met at 10:07 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: If we might begin with this morning's session, I would like to invite the Honourable Stephen Kakfwi and Ted Richard to please come forward. The Honourable Stephen Kakfwi is the Minister of Aboriginal Rights and Constitutional Development for the Northwest Territories and Mr. Richard is a member of the Legislative Assembly.

We are very grateful to both of you for coming to Toronto and joining us this morning. We also want to thank you for the material which you have provided to us, both the copy of the presentation you are going to make as well as some informational material regarding the Northwest Territories, especially the 1983 constitutional accord on aboriginal rights. Committee members will be interested in getting into some questions in that area once you have concluded your presentation.

I think at this point I would simply turn the proceedings over to you and would ask you to go right ahead. We have two hours and we do want to make the best use of that time to make sure that you are able to get your points of view over to us and that we have a chance to ask some questions. Perhaps with that as preamble, I would turn it over to the two of you to proceed as you wish.

LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES

Hon. Mr. Kakfwi: We have a presentation to make this morning and I would like to begin by explaining that we share this opportunity as members of the Legislative Assembly of the Northwest Territories because we are of a government that is a consensus government. We do not have party politics in the Northwest Territories and because of the seriousness with which we view this whole issue, in our concerns about the Meech Lake accord, we have taken the opportunity to do a presentation together. I wanted to mention that before I begin.

I thank you and say good morning to members of the committee. My name is Stephen Kakfwi and with me is Mr. Ted Richard. We are here today on behalf of the Legislative Assembly and the government of the Northwest Territories.

As nonresidents of Ontario, we wish to thank you for permitting us to address you today. We realize there must be many individuals and groups in Ontario that will want to make presentations before this committee and we especially appreciate the helpfulness which your staff has extended to us. As you may know, we have just begun the winter session of the Northwest Territories Legislative Assembly and your staff assisted by scheduling this presentation at a time which is convenient for us.

Before we begin a detailed examination of our concerns, we want to take a moment to explain what we believe are important differences between our

presentation and the other presentations you may have heard since February 1. Some of the things we are about to say might offend you, but we believe they must be said.

We understand that you have had no presentations from other provincial legislatures or governments. You will be hearing from the Yukon later this afternoon. It might strike you as unusual that elected representatives from another jurisdiction are appearing before your committee. It is unusual, and with due respect to each of you, it is for us degrading. It is degrading for Mr. Richard and I to have to travel 3,000 miles to tell you that the people of the Northwest Territories have again been ignored by the rest of Canada.

We say "again" because in November 1981 the entire Legislative Assembly of the Northwest Territories travelled to Ottawa to protest our exclusion from constitutional conferences which had also bargained away our rights as Canadians. It is degrading for us to have to try to convince you that we are part of this country.

We are not Algonquin Park north. We joined this federal union in 1870. The Northwest Territories has been carved up to create Manitoba, Saskatchewan, Alberta, northern Ontario, northern Quebec and the Yukon. But the Northwest Territories still does exist. Believe me, there is a government of the Northwest Territories. There is a Legislature of 24 members. We do not represent some single-interest group. We are here representing a public government, not a municipality but a public government with jurisdiction over a land area that embraces one third of Canada.

We find it degrading that the Legislative Assembly and the government of the Northwest Territories have to resort this sort of forum to receive a hearing. Will it be a fair hearing? We understand that the Premier (Mr. Peterson) has already advised that he will not be considering the concerns of women, natives and northerners until the Meech Lake accord has been ratified. In other words, until it is too late to make changes.

So why have we come here today? We have come to talk about Canada and about the Meech Lake deal. We urge you to take a broad view of your mandate and ask that you recommend in your report the amendments to the proposed 1987 constitutional amendments which we will suggest in this presentation.

The constitutional amendments of 1987 are unacceptable to the Legislative Assembly of the Northwest Territories for the following major reasons:

1. The amending formula in part V of the Constitution Act 1982 will be changed to give every province powers to interfere arbitrarily with the constitutional development of the Northwest Territories and Yukon. Any and every province will be able to prevent the Northwest Territories and the Yukon from becoming provinces. This provision must be removed from the proposed amendment. It is unfair and inconsistent with the constitutional history of Canada.

2. The constitutional amendments of 1987 will also give all provinces a role in the extension of boundaries of existing provinces into the territories. The only governments which have no say in the process of changing territorial boundaries are the territorial governments which are directly affected. A change to territorial boundaries should be a matter for the Legislative Assembly of the Northwest Territories, the Parliament of Canada and the Legislature of the province or provinces directly affected.

3. We are extremely concerned about the new provisions in the constitutional amendments 1987 that will exclude the elected representatives of the two territories from the fundamental and obviously critical processes of executive federalism which have come to dominate political decision-making in this country. Elected representatives of the two territories must be invited to the annual constitutional conferences on the economy and on Senate reform and other matters. The people of the Northwest Territories and their governments are obviously affected by these matters as much as any province.

4. The Constitution Act, 1867, would be amended to include new provisions related to the Supreme Court of Canada. Territorial governments have been given no role in nominating candidates for appointment to the Supreme Court of Canada, and there are doubts as to whether a resident of the territories would, in practice, ever be nominated by a province. The appointment of judges has been politicized. It has also become discriminatory.

5. Finally, some federal government sources have indicated that the provisions relating to the Senate might be interpreted unfavourably in the context of the Northwest Territories and the Yukon. It may be technically possible for the territories to nominate senators. However, it is far from clear as the proposal now stands. It must be clarified.

You as members of the Legislature of Ontario and we as members of the Northwest Territories Legislative Assembly have a lot in common. Like you, we were elected to represent the interests of our constituents, and like you we are concerned about the future of our communities, the territory in which we have raised our children and the country that all of us are part of. Like the elected representatives of this committee, we have been told that the elected representatives of the people of the Northwest Territories have nothing to offer where the constitutional future of Canada is concerned. Like you, we have been told that 11 men working through the night at the Langevin Block have created the perfect "seamless web" and that the imaginations and energies of the remaining 25 million Canadians could not possibly improve on their creation.

The elected representatives of the Northwest Territories have been told that the Meech Lake accord is only designed to meet Quebec's concerns and that we will have to wait until some second or third round. The people of our territory must wait until the first ministers have exhausted themselves in discussions about such things as fisheries. Discussions on fisheries are entrenched in the Constitution. The rights of the people of the Northwest Territories to participate in the political and economic life of this nation are not.

If the 1987 constitutional accord represents a new co-operative federalism, why is it that not even a single elected representative of the Northwest Territories was in attendance when these 11 men struck their deal at Meech Lake and the Langevin Block? Unlike you, we the elected representatives of the Northwest Territories have to travel to Winnipeg, Toronto or Fredericton to plead for a hearing on issues which strike at the very heart of our rights as Canadian citizens. Can you possibly imagine our frustration with this process?

When it was reported in the press that the Premier told women, natives and northerners who opposed the Meech Lake accord that they must wait until it is ratified before Ontario would consider the complaints, did you think that was fair? When Mr. Peterson told you as a committee that you would not make any recommendations for amendments, did you wonder about

our system of government in Canada? Did you have a sense that this country has put aside its parliamentary and democratic system to accommodate the dictates of 11 men? Are you no longer representatives of your constituents?

If Mr. Peterson had been told by nine other premiers that his attendance at Meech Lake was not welcome because they had determined that Canada could get by without Ontario, would you as residents of Ontario have felt that the rest of Canada had passed you by? If the proposed Constitution included a set of rules whereby Ontario's provincial boundaries could be encroached upon by another province without Ontario having any say in the matter, would you feel that was fair?

It has always been our impression that Canada is a country where opportunities may vary from province to province but fundamental rights of individuals do not. The residents of Ontario are probably confident that their votes are worth something and whether they agree with the party in power or not, there is someone speaking out for their province in federal-provincial relations.

The proposed constitutional amendment 1987 should embody principles and values that transcend petty, pork-barrel politicking. In the Northwest Territories, we are losing confidence in our future in Canada. The vested interests in Ottawa and the provinces are denying us the basic right to control our future or even to have a say in it. The 11 men who negotiated the Meech Lake deal sent a message to all Canadians. In our view, the message to you was different from the message to us. To you they said: "If you want to have some influence in matters that directly affect you, don't live in the Northwest Territories or the Yukon." To us they said: "Canada is complete. The north is a colony. If you want to join the party, leave the north behind."

Ladies and gentlemen of the committee, we are not prepared to accept that message, nor do we believe that you should be. We can only hope that you have begun to see the bitter injustice that has resulted from the unbridled political pragmatism of the 11 first ministers who created the 1987 constitutional accord.

1020

Lest you think that we are ignoring the importance of bringing Quebec back into the constitutional family, we would simply like to state that the concerns we have do not affect Quebec's constitutional agenda. When Quebec refused to sign the federal-provincial agreement on November 5, 1981, they did so because the people of that province felt alienated and betrayed. Their assembly promptly enacted the override clause in section 33 of the charter to prevent the application of the charter to Quebec legislation. Quebec eventually presented a list of demands that had to be met if they were to rejoin the constitutional councils of the country. Since 1982, and even before 1982, Quebec's role in the federation has been a major preoccupation of federal-provincial politics. The 1987 constitutional accord meets their demands. The Northwest Territories and the Yukon have paid an unfair and disproportionate price in this deal.

We are not the only ones who perceive this constitutional accord to be a harsh denial of the rights of people in the two territories. Professor Schwartz of the University of Manitoba law school wrote this in his recently published analysis of the accord:

"It has been said that a society should be judged by how it treats the

least of its members. Canadian politicians have just been exceptionally generous to one of the 'most' of its members. There is no need and no justice in asking the north to pay part of that price. Quebec is already 'in' confederation as a province with fully equal rights. The northern territories already face unprecedented barriers to joining the club. To get the 'in' even more 'in,' shall we make the 'out' ever more 'out'?

"Some have argued that the Langevin Block text is a 'seamless' web. If one thread is pulled, the whole thing might unravel. Strangely, some of these same people were saying exactly the same thing about the Meech Lake text. Yet it was substantially improved at the Langevin Block meeting. If the 1987 constitutional accord is of such a fabric that the removal of one poisonous thread would leave it in tatters, then by all means, we ought to pull it."

We would like to discuss this "poisonous thread" which in our view can be pulled out without leaving the fabric in tatters.

In order for you to understand our sense of betrayal and alienation, you should know something of the history of this issue. Let me begin in 1981.

While the entire country was hot with the possibility of patriating the Constitution, the governments of the Yukon and the Northwest Territories were frozen out of the process. Two issues emerged, however, which directly affected the Northwest Territories in profound and unique ways. The first was a clause in the constitutional package which would have recognized aboriginal rights. As you will recall, such a clause had been dropped from the constitutional package at the request of certain provinces.

The other issue related to a little-noticed provision in the amending formula that suddenly allowed most the provinces to become involved in the creation of new provinces and in the extension of the boundaries of the existing provinces into the territories. These latter provisions went virtually unnoticed by the public because, quite frankly, they were unaffected by them. The government of the Northwest Territories and the Yukon, however, were immediately concerned.

Prior to the appearance of these provisions in the amending formula, the government of the Northwest Territories had heard no talk of an expanding provincial role in these matters. The provisions took us completely by surprise. As any student of Canadian history knows, Parliament alone has had since 1867 the power to create new provinces.

These provisions which gave provinces a direct role in matters relating to the constitutional development of the Northwest Territories and the Yukon were all the more sinister by reason that they came as a complete surprise to the two territorial governments. In November 1981, the entire Legislative Assembly of the Northwest Territories travelled to Ottawa to demand a reinstatement of the aboriginal rights clause and deletion of clauses which gave provinces a role in the constitutional affairs of the two northern territories.

While the aboriginal rights clause was reinstated, the provinces would not permit the deletion of new powers in relation to the territories which had been given to them. That, however, was not the end of the matter. The new Constitution required a constitutional conference by April 17, 1983, to discuss the identification and definition of aboriginal rights. Section 37 of the Constitution further required that elected representatives of the territories be invited to the constitutional conference if matters discussed directly affected them.

So we were invited. In fact, on the agenda of the first ministers' conference held on March 15 and 16, 1983, agreement had been reached among the participants to include an item relating to the repeal of those sections of the amending formula that allowed provincial participation in the creation of new provinces and the extension of boundaries of existing provinces into the territories.

Unfortunately, this was one of six major items that the first ministers were not able to deal with adequately at that conference, and so all first ministers, except Quebec's, together with the elected leaders of the Northwest Territories, the Yukon and the four aboriginal leaders, signed a constitutional accord on March 16, 1983. In it we agreed to return to this agenda item at one of three future constitutional conferences.

We never did come back to it, that is, not until April 30, 1987, at Meech Lake. By that time, section 37.1 of the Constitution, which guaranteed that representatives of the government of the Northwest Territories and the Yukon would be invited to participate in these constitutional discussions, had expired and had been repealed by the operation of law. This expiry and repeal occurred only 12 days before the first ministers met at Meech Lake. Obviously, when we read the Meech Lake accord we felt betrayed.

The initial statements from the Prime Minister and the premiers after Meech Lake indicated that the provisions which had negative implications for the Northwest Territories and the Yukon were not intentional. Your Premier has said that we were mere casualties of the process. Senator Lowell Murray, on the other hand, advised the Senate and House of Commons committee in August 1987 that "at least some of the provinces were extremely jealous of the trappings of provincehood and opposed even giving the opportunity to territorial governments to nominate residents as senators or qualified residents to fill a vacancy on the Supreme Court of Canada."

What conclusions can we draw from the process to date? In 1981, our protests were dismissed as unimportant. In 1983, we received in a constitutional accord a promise and an undertaking that the Prime Minister and the premiers would address our concerns about the new rules which gave provinces a direct role in the constitutional affairs of the Northwest Territories. Three first ministers' conferences came and went and there were no discussions on this item.

Twelve days after our constitutional guarantee of participation in first ministers' conferences expired, the Prime Minister and premiers met in secret and dealt specifically with the matter relating to the creation of new provinces and an extension of provincial boundaries into the territories, among others. On June 3, the Prime Minister and premiers agreed to a legal text which imposed harsh new requirements on the Northwest Territories and the Yukon. So whose idea was this? Which province or provinces decided that this should be part of the price tag for Quebec's return to the constitutional family? We do not know.

Can we conclude that the harsh treatment of the Northwest Territories and the Yukon was a mere oversight by the first ministers? Can we conclude that this ill-treatment was by design? We do not know for certain, but we believe it was. The stories emerging from those associated closely with the process are contradictory.

Mr. Richard is now going to address some of our concerns in more detail.

1030

Mr. Richard: Mr. Chairman, I want to add my thanks to that of Mr. Kakfwi to you and your committee for allowing us to appear before your committee because we are not residents of your province and you have considered us a special case in this instance. Although Mr. Kakfwi has indicated that we have travelled a long way, some 3,000 miles, to come here, we do come from a part of Canada that is as much as part of Canada as is Toronto or Kingston or Sudbury in your province.

We are representatives of a legislature. We do hope to convince you today of the merits of our case. As you recall, Meech Lake was April 30, 1987. Our legislature was in session in May and we passed a unanimous resolution declaring our opposition to it. We sent our government leader to the Langevin Block. He knocked on the door and was not allowed to attend the meeting. I thought that should be mentioned.

Last summer, when the government of Canada convened very quickly and on short notice public hearings in August, our legislature was dissolved at that time for an election, but we did send our Minister of Justice, who made a presentation on all of these points that we are making to you today. I hope that in your deliberations you will make reference to the report of the joint committee. There is a chapter on our northern issues. I want you to note that, although that joint committee said, "Although these concerns are valid, we cannot reject the Meech Lake accord because of these northern issues," even on that, that joint committee missed one of our points entirely, and for me the most important one. I will refer to that later.

The other hearing that we have had access to before today was the Senate Task Force on the Meech Lake Constitutional Accord and on the Yukon and the Northwest Territories. It did travel north to Whitehorse, Yellowknife and ??Akluwit and we understand its report is due in about two weeks' time. My sense of it is that we are going to get a sympathetic recommendation from the Senate task force.

As you can understand from what Mr. Kakfwi has stated already, our concerns are two in nature. One is with process. The 1983 accord that Mr. Kakfwi referred to in his submission we have included in the materials that we have provided to each one of you. I ask you when you have the time to look at that document and get a sense of our feeling of betrayal of this process that Mr. Kakfwi has outlined. It is in writing. The promise made to us to deal with these outstanding issues from 1982 was in writing. They were never dealt with. That promise expired on a date in early April 1987.

Then all of sudden these 11 people met on April 30 and dealt with, among other things, the issues that they had promised to discuss with us, and they did this in our absence. We see virtually bad faith in the dealings as they relate to us northerners. So we have a problem with the process.

We are also concerned about the text of the actual document that came out of the Langevin Block. I would like to refer to items in the order in which they appear in the actual 1987 constitutional accord. Section 2 of that document would add a new section to our Constitution of Canada, a new section 25, regarding the appointment of senators. Learned minds have in the last eight or 10 months given different interpretations of that section. At a minimum, it has to be clarified to ensure that we, as a Legislature and a government, have as much authority at least to suggest to the Prime Minister a list of possible Senate appointments. From the readings of the constitutional

experts, either we do not have that right or at least it is uncertain. We want that clarified.

Section 3 of the 1987 constitutional accord would add new provisions allowing for immigration agreements between the provincial government and the federal government. We see no reason why that opportunity should not be extended to the two territories. We are an unpopulated part of Canada. It perhaps should apply more to us than to the provinces. The immigration issue, I should say, is not one of our major points.

Section 6 of the 1987 constitutional document would add new provisions regarding appointments to the Supreme Court of Canada. One of the new provisions states that a judge or lawyer from the Northwest Territories or the Yukon may be eligible for appointment to the Supreme Court. However, the process of appointing must come from a provincial list. This is a problem for our resident judges and lawyers in the territories, because how are they going to get on to a provincial list? Which Premier is going to realistically name a nonresident of his province on his list when he does get to make his recommendations to the Prime Minister?

You may think that because we are a small jurisdiction we do not have competent lawyers and judges, but I would like to point out, to put it in perspective, that on two occasions in the last decade a resident judge from the Northwest Territories--actually at a time when we had only one Supreme Court judge there--in 1978 and again in 1983, our one judge was taken from us for appointment to the Court of Appeal, in the one instance, of the province of Alberta and, in the other instance, of the province of Saskatchewan. We have had and still have competent lawyers and judges. This would disenfranchise them in terms of their aspirations to the Supreme Court of Canada.

There is a reference in a report of the Canadian Bar Association last year that was submitted to the Supreme Court of Canada for review. Recommendation 15 said: "The Supreme Court Act and any constitutional text"--including the one we are dealing with today--"ought to make clear that members of the bench and bar of the territories are eligible for appointment to the Supreme Court of Canada." That document was handed to the justices of the Supreme Court of Canada and they endorsed that recommendation with the phrase, "We agree."

Subsequently, the CBA passed the resolution which is set out on page 18 of our presentation, part of which says: "Be it resolved that the Canadian Bar Association urge the federal and provincial governments to immediately reconsider the process of selection of judges for appointment to the Supreme Court of Canada as provided in the Meech Lake accord and adopt forthwith the Canadian Bar Association recommendations on the appointment of judges in Canada." So that is the issue on the Supreme Court appointments.

Section 8 of the 1987 constitutional document would add a new section 148 to our federal Constitution providing for an annual first ministers' conference on the economy and other matters. Such conferences clearly affect our government and our citizens. On that issue, we urge that the text be amended to ensure that elected representatives from the territories are invited to participate in these meetings.

Let me put that in context for you. We now have an annual budget, as you will see from one of the other glossy documents we have provided, of a magnitude of \$800 million. We far exceed the budget of Prince Edward Island.

However, 74 per cent of our revenues come from the government of Canada. We have to develop our own economy. Therefore we should be participating in these national conferences on the economy.

The next point is for me the most important point of all, dealing with the extension of boundaries into the territories. Section 9 of the 1987 constitutional amendment document changes the amending formula in the Constitution of Canada. On the issue of provinces extending their boundaries into the territories, it would now require unanimous consent of all the provinces, the Senate and the House of Commons to do that. It is silent on whether you consult or get the consent of the elected representatives of the territory you are encroaching upon. Quite frankly, to me, it is appalling that the first ministers would put that in the constitutional document in 1987 and 1988. Clearly any changes to our boundaries must only happen with our consent.

1040

Perhaps I can remind those of you who have read the Constitution of Canada that there is a section of the Constitution of Canada, section 43, that deals with a boundary between two provinces changing. Let me not mention Ontario. Let us say Alberta and Saskatchewan. You all know the area of Lloydminster. Let us say those two provinces, for whatever reason, want to change the boundary slightly east or west. Section 43 of the Constitution of Canada says how that is achieved. It says it will be achieved by a resolution passed by the legislatures of those two provinces and the Parliament of Canada. It is only logical that is what should happen. Why should New Brunswick or British Columbia or Ontario be involved in it?

We say if the province of Alberta wants to move its boundary north to the Beaufort Sea and take our territory, at a minimum we have to be consulted and agree to it. It is bad enough that the formula they are proposing would bring New Brunswick and BC into that discussion, but the most appalling part is that we are not in the formula.

Let me put it in a context, too, involving Ontario. Prior to 1912, part of your province was part of the Northwest Territories. I was not around then--I do not think anyone in the room was around then--but someone in Ontario, in his wisdom, sought that territory and obtained it. But those discussions were between this province, as it then was, and the Parliament of Canada. New Brunswick did not have a say in whether northern Ontario should be part of the province of Ontario; nor did British Columbia. That is the history of that issue.

This issue, I must say, has not got the attention it deserves. We have been screaming since last April 30 about the Meech Lake accord. Whether it is the politicians who have been speaking or the media which have been covering it, it is the new provinces issue. The creation of new provinces is the one that gets all the attention. To me, this issue is more important. Even in the report of the federal joint committee I referred to, if you can believe it, this issue, as important as it is--and there is an entire chapter on northern issues in the joint committee's report--is not even mentioned. It is in the presentation that our Minister of Justice made. It is in the presentation that the Yukon government made. But there is not one mention of it in the joint committee's report.

I hope that your committee will see fit to address this issue. Although we feel very strongly about new provinces, realistically, let us pick a date 30 or 40 years down the road. This issue is five or 10 years down the road. If

Bourassa wants James Bay, is he going to wait until after we are a province, or is he going to move on that now? I say that is more important, more immediate and more appalling than these other issues.

Let me move on to the new provinces issue at the bottom of page 19 of our brief. The 1987 constitutional accord would, again in section 9, change the amending formula, and in the list of items that the amending formula applies to is a requirement for unanimous consent of the provinces, the Senate and the House of Commons to establish new provinces. It provides that only the provinces or the Senate or House of Commons can initiate the establishment of a new province.

This process is repugnant to those of us Canadians who live in the Northwest Territories. The establishment of new provinces should be a matter left to Parliament and the affected territory alone, which has been the case throughout Canadian history.

We are disappointed that people like Getty and Devine would agree to this. We say, "How soon they forget." The year 1905 is not that long ago. The provinces of Alberta and Saskatchewan were created out of the Northwest Territories by the people then living in those parts of the Northwest Territories, and they dealt with Ottawa alone; they did not have to get the consent of New Brunswick or Ontario. Yet now, in 1988, they say that it is not an issue between residents of the Northwest Territories and Ottawa; it involves and it will require the consent of every one of the provinces.

Finally on our list of grievances with the 1987 constitutional document, section 13 adds a provision for constitutionally entrenching first ministers' conferences. At least once each year, starting this year, 1988, there is to be a first ministers' conference. We are urging that this provision, section 50, be amended to ensure that elected representatives from the Northwest Territories and the Yukon Territory be invited to participate in those meetings.

If the constitutional status of the Northwest Territories or some matter which directly affects the territories were to be discussed at the conference, there is nothing in this section 13 that would prevent the first ministers from again bargaining away the rights of northern residents in a secretive process that excludes our elected leaders. So we ask that this be changed, lest Meech Lake be repeated.

We are not conceding that other matters in the accord do not affect the Northwest Territories. We particularly identify with the women and the aboriginal peoples of Canada who have been told to wait in line at future conferences behind Senate reform and fisheries. The aboriginal peoples of Canada certainly constitute "distinct societies." Their rights have been recognized and affirmed by section 35 of the Constitution, yet the Yukon and Northwest Territories continue to be treated like colonies and the people of the territories as second-class citizens.

The Meech Lake deal gives the provincial governments more power over the constitutional future of the two territories than has been afforded to the territorial governments. The economic future of Canada certainly involves us. The people living in the territories are directly affected by free trade, by the spending power and by resource development, but the governments of the territories will not be invited to economic conferences under this apparently renewed "co-operative federalism."

I hope, Mr. Chairman, that we have made our point on these issues. We came here today to your province to try to convince you that we have legitimate concerns and that the time to deal with them is now, at this stage of the process, not at some future date when these offending provisions have become part of the supreme law of this country.

We have had a great deal of sympathy, as I have indicated, from some politicians and senators when we have raised these issues, but we need action and not sympathy. We need representatives, MLAs like yourselves, colleagues of ours in the profession, to take courageous steps to bring the Yukon and Northwest Territories within the vision of southern Canadians. We are asking you to rise above the confines of party discipline to test the values and principles upon which this country has been founded.

The text of the 1987 constitutional document did not receive adequate reflection or consultation before the first ministers committed themselves and their governments to it. The items we have discussed today certainly were never identified by Quebec as being part of its demands or its constitutional agenda. Our recommendations, if you agree with them and if they are implemented, would in no way affect Quebec's constitutional agenda. Again, Professor Schwartz, in his recent book, has pointed out:

"One province has no direct authority over the people of any other province. True, a new province does have a vote over constitutional amendments. But an extra vote, no matter how 'hostile,' creates no real risk of imposition on an existing province. The latter can, according to other aspects of the 1987 accord, 'opt out' with compensation from any amendment that diminishes its authority; and it can veto any changes to federal institutions. Even under the existing amending formulae, the addition of a new partner in Confederation poses essentially no 'risk' to the existing authority and rights of any provincial government, let alone that of Quebec."

1050

We urge your committee, Mr. Chairman, to recommend amendments to the Meech Lake accord. There is certainly precedent for doing so. The federal-provincial agreement of November 1981 was changed in four respects before it became the Constitution Act, 1982. So it was done before. In fact, at the last round, between the 1982 first ministers' document and the actual law, there were changes made. The removal of the sex equality clause from the override clause was one of them. The native rights clause--and my colleague Mr. Kakfwi was part of that lobby process at the time--and two other issues were changed in the time frame that we are now in.

We want to remind members of your committee that it would subvert, in our view, the fundamental principles of our democratic system if you were not able to amend the accord. To conclude otherwise would, in the words of Senator Forsey when he spoke to the joint committee in Ottawa last August, "establish a new, supreme, sovereign, omniscient, inerrant, infallible power before which the function of Parliament and the legislatures would be simply to say *romula locuta est*: the first ministers have spoken, let all the earth keep silence before them."

I myself am an MLA, as you people are. I would have to think hard about that kind of statement if I were sitting in one of your chairs. Where do my responsibilities lie? The Meech Lake accord was struck because Quebec had been promised a fair deal when it decided to choose Canada over independence. We are not here to diminish Quebec's role in Canada, nor do we wish to minimize

the promises that were made and broken in relation to Quebec over the years. At the same time, we cannot ignore, and we are asking that you not ignore, the promises made to the people of the Northwest Territories as they have struggled to participate in the political and economic life of this country.

In 1966 a couple of distinguished Canadians--John Parker, who is our present commissioner, and Professor Beetz, who is now on the Supreme Court of Canada--were addressing Inuit people on Baffin Island and explaining to them what it meant for them to be citizens of Canada. I hope at the time there was an interpreter available for the Inuit people. This was some 20 years ago.

"In larger towns and in larger cities in other parts of Canada it is important to have organizations or organized government in order that people can live within certain laws and know the way that they are going....

"In the higher echelon of government we find elected persons whom we elect.... That is why you and I are free people. We are not the ones who take orders or who are servants; we are the ones that give orders by voting for somebody...."

With that kind of message, the government of the Northwest Territories moved from Ottawa to the now capital city of Yellowknife in 1967. We have made tremendous, gigantic steps since that time towards our eventual goal of responsible government.

I should tell you that from 1905, when the two provinces were created out of our territories, we did not have elected representation for 70 years. It was only a short time ago--1975--that we had a fully elected Legislature. For many years it was all appointed bureaucrats and just prior to 1975 it was a mixture of appointed people and elected representatives.

It is only three or four years ago that we now have only elected people as ministers of our government, so we have moved rapidly, building government in the Northwest Territories on the principle that was explained to the Inuit people in 1966 in the quote that is referred to. However, we are now faced with "jealous" provincial governments making secret deals to prevent us from becoming a province.

The provinces, with the acquiescence of the Prime Minister of the country, have also given themselves powers to displace our legislatures and democratic institutions. Those powers may allow provincial boundaries to be extended into the territories without consulting or obtaining the consent of territorial legislatures. This, of course, is unacceptable to us.

Members of the committee might think this is pie in the sky. This extension of the provinces into the territories is not being considered by any of the existing provinces. We remind you that at least one Premier, Premier Strom of Alberta, made this suggestion at a constitutional conference in 1969. Personally, I am convinced that British Columbia, Alberta and Quebec, of the present administrations, do have their eyes on our northern territories.

As recently as November 1986, we have a newspaper clipping on file from one of Canada's major papers quoting a Quebec bureaucrat speaking on behalf of his government. He was reacting to the then news, and I think you have all heard it in the north, one of the big political issues in the Northwest Territories recently is the possibility of our dividing into two territories.

In reaction to that, this official stated at a conference: "Hudson Bay

and James Bay should be divided up before there is a big battle over potential oil and gas resources there. Only an agreement between Ottawa, Quebec, Ontario and Manitoba on the bays can avoid a crisis....Both bodies of water and the islands in them are now part of the Northwest Territories. This extension of natural provincial boundaries should be done before the division of the Northwest Territories takes place."

The official is further quoted as saying, "It is easy to foresee all sorts of political and social difficulties if one day Quebec, Manitoba and Ontario have to go to Frobisher Bay, the capital, maybe, of this new province, and beg for the resources that are there in Hudson Bay and James Bay."

I say, why not? What arrogance for that official to say that.

Perhaps, Mr. Chairman, you can now begin to appreciate our concerns with the Meech Lake accord. Since 1905 we have been advancing towards provincial status. We now find our way barred by a deal made by first ministers in a secretive and exhaustive process. Senator Murray told the special joint committee last August, "At least some of the provinces are extremely jealous of the 'trappings of provincehood,' and oppose even giving the opportunity to territorial governments to nominate residents as senators or qualified residents to fill a vacancy on the Supreme Court of Canada."

We hope your committee will give consideration to our recommendations for amendments at this stage of the process and that you will take the courageous step of recommending these amendments to your Legislature.

To conclude, I would like to read excerpts from a speech made by the Honourable Pat Carney in the House of Commons in November 1981, over six years ago. Ms. Carney is a former resident of the Northwest Territories. She was speaking at that time to an amendment proposed by the then Conservative opposition, supported by the New Democratic Party federally. The amendment called for the deletion from the amending formula then proposed of those sections which gave provinces a role in the establishment of new provinces and in the extension of provincial boundaries into the territories.

The Tory party's amendment was defeated by the then Liberal government. The roles have changed in six years. Mr. Turner's party, federally, did attempt an amendment including our concerns last year but it was defeated in the federal House.

1100

But look at what Ms. Carney said over six years ago on these very issues: "Mr. Speaker, we are debating an amendment which would remove an insulting and degrading inequity in the resolution before this House, which seeks to provide us with a made-in-Canada Constitution. That inequity is inherent in the provisions of the amending formula for the proposed Constitution which would allow the extension of existing provinces into the two northern territories without their consent.

"It is degrading because it would enshrine in the Constitution of our country the revolting concept of a perpetual colonial status in the north. It is insulting because it would entrench in the Constitution the repugnant idea that there could be two different classes of Canadians with different political rights, depending on whether they live in Canada north or Canada south.

"These two offensive clauses represent the threat of a possible grab by some of the provinces for northern resources which more properly belong to the northerners and to Canadians as a whole. If retained in our Constitution, they virtually eliminate any hope that the two northern territories could evolve as a province, as did the rest of the country.

"Thus, this resolution in its present form is offensive, it is repugnant and it is also ludicrous. The resolution suggest that one Prime Minister and nine southern premiers could carve up the north in their so evident self-interest. It would created a Constitution drafted by southern Canadians which gives them rights denied to northern Canadians.

"I hope the Premier of my province"--she was referring to the then Premier Bill Bennett--"can see the unfairness of this resolution. Imagine the anger and the fury and the rage of those Canadians who live north of 60, who by an act of this Parliament would be condemned to perpetual serfdom and to perpetual colonial status unless these offensive clauses are withdrawn.

"I can relate to this anger because I experienced it while I was a resident of the Northwest Territories. I can relate to it because it is an anger similar to that felt in the west when the provisions of the original resolution laid before the House would have created different classes of provinces.

"We are talking about Canadians. If members of this House are prepared to declare that these Canadians are to be enshrined as second-class citizens under our Constitution, we should be ashamed of ourselves."

She went on to state, regarding the problem of not amending the thing midstream: "I would suggest that if we sell out the north, we would sell out our self-respect as Canadians. We should never be a party to a document which would permit the extension of the provinces into the Yukon or the Northwest Territories without territorial consent.

"Some may argue that amending the resolution at this stage might threaten the spirit of the accord reached by the Prime Minister and the premiers." How recently have we heard that? Talk about déjà vu. "We can only ask ourselves why the Prime Minister and the nine provincial premiers would feel that discriminatory measures which were unacceptable to them would be acceptable to people in the north."

"If we pass a resolution which gives certain rights to some Canadians and denies them to others, then we will have destroyed the very foundation of this Parliament, this federal institution of a country which stretches from sea to sea to northern sea. If we pass this resolution unamended as an act of Parliament, it will be an act of contempt towards Canadians north of 60.

"I urge you," she stated, "to right this wrong, remove this self-serving insult and ensure our self-respect as Canadians. I implore you to support our position that these degrading clauses must be removed."

Mr. Kakfwi and I and the other 22 MLAs we represent back in Yellowknife are relying on your help. We ask that you not accept that no changes can or should be made. This is not just another bill that you, as legislators, deal with. This is the Constitution of Canada.

You have already indicated to us your sense of fair play by the fact that you have allowed us to come and participate in what is basically a

provincial public hearing.

In conclusion, I want to tell you on this issue, and trying to set aside my own bias, what I as a Canadian citizen see from a distance. I see we are living in a part of Canada that is being virtually totally ignored by the 11 first ministers. Ironically, this is at a time when the government of Canada is prepared to give the United States of America free access to northern Canada to test cruise missiles and other military aircraft, and it is also ironic that it is happening at a time when the government of Canada is telling the world that Canada has sovereignty over the Arctic waters, and yet we Canadians living there are being totally ignored by these 11 first ministers.

What I see from a distance is political expediency and I also see, quite frankly, weak southern Canadian politicians who are afraid to stand up to the one or two first ministers who, in my personal view, simply want to march or parade this accord, uninterrupted and very quickly, into the Canadian history books.

I hope the people in this room are not weak but are strong politicians and will give us some assistance in this matter.

Mr. Chairman: Thank you both very much for what was a very frank and full presentation. There certainly were a number of items in it that I must admit I had not heard discussed and was not fully aware of. I think those points and issues will be of great help to us.

We have felt within this committee that as a select committee of the Ontario Legislature it is to that Legislature that we make our report and critical to that is a process in which we try to listen to as many individuals and groups as we can. Only at the conclusion of those hearings and after discussion among ourselves will we be in a position to make our report. I think many things are said by many people in other places. What we are trying to do, as a committee, is to listen as openly and honestly to you and to others and at the end of that process, I hope very much we will bring forward a report which will try to meet as many of the needs as we have heard and feel that we can incorporate.

It is important that you bring forward your proposed amendments, suggestions and so on because we need those in terms of ultimately developing our report. So we are most grateful for that and I have a number of questioners.

Mr. Offer: I would like to thank you for your presentation. Obviously you have touched on some very important matters.

Mr. Richard, I would like to deal with, as you indicated in your opinion, what are the most important concerns which you have, and that is, if I hear correctly, first, the creation of a new province and second, the incursion of existing provinces into the territories.

I see, as you were speaking on page 4 in your article 2, you addressed that issue and provide some background information on page 25 with respect to certain articles which have been written.

I imagine you have heard the comment that the mere fact that there is now unanimity required will provide a greater security to the territories with respect to the incursion of existing provinces into the territories. The mere fact that unanimity is now required for that matter will now provide that type

of "security." I use the word "security" but that is probably not the correct word.

What I would like to do is get some comment from you on that issue. After that, I would like to go into the creation of a new province, but on the point of incursion of existing provinces into the territories, the mere fact that there is now a unanimity proposed does provide a protection for the territories which was not in existence before.

1110

Mr. Richard: On that argument, because I have heard it before, the first point is that the suggestion is being made that going from the 1982 formula to the 1987 formula is better for the north because instead of only seven provinces agreeing to an extension into the territories you now need 10. That presupposes that the 1982 formula is a good one. It is not. It is as appalling as the 1987 formula. We fought it in 1981. That is the first point. The 1982 existing formula is a bad one on this issue.

The second response to your query is that our position on clause 42(1)(e), the extension of boundaries, is not how many provinces should agree, it is we should agree. If I could cut a deal today, I would say, "All right, leave the 10 provinces in there, if you will just add us, as a vote." In a perfect world we may say to Alberta, "Sure, you can take over our territory right up to the Beaufort Sea, but only if we agree."

The issue is not how many provinces are in the formula; the issue is that we have to be in the formula, on the extension of boundaries.

Finally, I guess my response to you is that I do not feel secure at all. We have seen the back scratching that happened at Meech Lake. Who would have predicted before then that Prince Edward Island or Manitoba would get a veto over constitutional changes in this country? These guys behind closed doors will give to each other and if Don Getty or Premier Bourassa wants part of the northern territories, I believe that he can get the other nine votes because he will cut a deal with them. My fear is that we will not be there to call a halt to it.

I do not feel with this change from the 1982 formula to the 1987 formula that we are any more secure at all, for those reasons. I do not know if I have answered your question.

Mr. Offer: If I might just continue with respect to the creation of a province, you have said, again on page 4, that provinces must be directly affected. I hope I am not reading it wrong. It says, "A change to territorial boundaries should be a matter for the Legislative Assembly of the Northwest Territories, the Parliament of Canada and the Legislature of the province or provinces directly affected." I would expect that applies to the creation of provinces also.

Mr. Richard: That paragraph 2 that you are referring to on page 4 deals only with the extension-of-boundaries issue, and the province affected would be, say, Alberta. If it wanted to come north, we are saying that it is an issue only among the Northwest Territories, Alberta and the federal government.

Mr. Offer: OK. So it does not deal with the creation of a province.

Mr. Richard: No; the next paragraph does.

Mr. Offer: Okay. Thank you very much.

Mr. Breaugh: I wanted to kind of clarify, at least for me and, I think, most members of the committee. You are not here at our whim or anything like that. We sought you out. We felt it was important that we get your perspective on this agreement and that you bring to our deliberations some understanding of what this deal looks like from a very different situation in Canada. So I hope you think you are here as our peers, our equals, our fellow Canadians and as legislators who have got the same kind of dirty work to do, which is to look at this accord after the fact and decide whether it is for real for not. I really think if the sense is that part of the people of Canada are betrayed in order to put together a package, it really cannot be much of a package.

It seems to me that a lot of what is in the accord from your perspective that would be worrisome is not actually what is written down there but what is not written down there. It also seems to me that part of what you had to say this morning is that it speaks to the intentions of the people who put together this agreement.

Now, these may be 11 wise people or 11 fools behind closed doors. Who knows what they are? But it does seem to me, having been in politics for a while, that if I made a mistake, if I wrote something down on pieces of paper and I had now almost the better part of a year to say, "Well, that is not what we meant; your rights aren't threatened," I would want as a practising politician to go or send my staff people out to clarify the situation.

I would assume that if your rights are not threatened under this, you must have been inundated in the last year with people from the federal government of Canada trying to convince you that your rights are not impeded, you are not threatened; here is how you are included; you will be invited to the first ministers' conferences. In almost all of those concerns that you have expressed to us this morning, it seems to me, there was an obligation on the part of the federal government, probably as the person who would take the final responsibility for this, to assure you that none of these things are true. Have they done that?

Mr. Richard: No, they have not. We as a Legislature, as I mentioned, passed a resolution unanimously last May--in other words, after Meech Lake and before Langevin Block--and sent copies of it to everyone from the Prime Minister of Canada on down to the provincial premiers. We have not got any assurances that it will be dealt with. Well, they said they would not disturb the current accord; I mean, they answered it that way. They would not let our then Government Leader and the Government Leader of the Yukon attend the Langevin Block agreement.

If my memory serves me correctly, there were changes made. The text was improved from Meech Lake to Langevin Block. I recall that one of the last sections, section 16, did some clarification. Some of our points are just that, Mr. Breaugh; clarification only is what we were asking for. But they would not make any changes for us before Langevin Block and would not let us go to the meeting.

But to answer your question, no, we have not got those kinds of reassurances from them.

Mr. Breaugh: Let me just pursue that just for a second because I think this is important. I find that really strange. As somebody who has been in politics for a while, I know that when somebody points out a problem in a law that has been passed, we, as a general rule of thumb, try to figure out, is their concern valid? If it is, we try to address that. If it is not, we at least have the courtesy of going to them and saying: "Well, I think you have misread this a bit. I think there is something in your understanding of the bill that is not correct." It seems to me there should have been a lot of activity, on the part of the federal government at least, and probably all of the provinces, to listen to what you had to say and then to address your concerns. If all you really need is clarification, surely someone should have been able to give you that.

1120

Mr. Richard: Sorry, it has not happened. On just the one point, on the Supreme Court of Canada appointments, if you look in the report of the joint committee, they use the words--these are the senators and the parliamentarians--"We see no justification for this having happened." They use words like that, yet they will not recommend a change. They are that convinced that we are right.

As Mr. Kakwi referred to in part of his presentation, the problem we have is that we are getting two messages. We are getting a message from some people: "It was just an accident. We just forgot about you guys." Your Premier (Mr. Peterson) has told one of our leaders that we were a casualty. That is his word.

Mr. Breaugh: Can I ask you one final question? A number of us have been trying to sort out what you could do. If amendments do not carry, what other things could you do? We talked a fair amount about making a reference to the court to see whether we could get these clarifications and do something that way, but in part it goes back to something that I think both of you said, and I would appreciate a fairly frank judgement call on this. Do you believe it was the intention of these people to word an agreement in such a way that it actually did take away rights from some Canadians?

In part I have heard a lot of comment, and the word changes made between the original agreement and the finalized version, that, "Well, we did not mean to do that." I just find it difficult to believe that all of the most prominent politicians in the country, not very many of whom were new to the process, with all of their staffs, all of their listeners and advisers and all of that, could really make errors of that kind. It really kind of goes to the judgement, because obviously if what we need here is clarification, if they did not intend to do it and we could clarify that, that is one set of conditions. If it was their intention actually to exclude people from this agreement, to remove some rights, then that is not going to be rectified by some clarification even probably by a court.

Hon. Mr. Kakwi: In my view, I think that some of the provinces--as we pointed out, Quebec, probably British Columbia and Alberta as well--have some very real interest in seeing their borders run north to the Arctic. I would think that provinces like New Brunswick, Nova Scotia and Prince Edward Island do not really have those types of aspirations. So with some, I would think it is a very direct vested interest in getting that supported and, for some, a nonissue. If it means it is going to carry the day that they agree, I think they have done that.

My feeling about it is that it depends on what your view of the north is, how offensive you may think the residents of the north would find such an accord. I would think historically, because the provinces were created only when the population became predominantly non-native, that it would probably apply in this case as well that if the Premiers of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland felt--and a line which we use very much is that the majority of the people of the Northwest Territories and the long-term residents are native people. Historically in Canadian history we as native people have been treated very much as second-, third-, fourth- or fifth-class Canadians, if at all. The rights that all Canadians enjoy, we received only very recently. That would perhaps dull their interest in ensuring that the residents, whoever they perceive the residents of the Northwest Territories to be, are accorded the same rights that other Canadians expect and do get. That is my suspicion and my view.

If the population of the Northwest Territories was overwhelmingly non-native, there might have been a chance, perhaps a greater degree of interest on the part of the premiers and their advisers, to ensure that nothing in the accords that crop up from time to time threatens or takes away rights that these residents should enjoy. I guess that is basically my view of it. It depends on what the perceptions of the north are. It is my suspicion, I guess, that aside from the relatively small population and the remoteness, is the fact that we are still--and I say "still" because it is quickly changing--a slight majority in the Northwest Territories are still native people.

Mr. Chairman: Mr. Kakfwi, just as a follow-up on that one, have you or has the government of the Northwest Territories spoken directly with the Quebec government, for example, on these issues? Do you have any sense of a possible opening there? Because, as you both have noted, one of the problems that any legislative body right now has in dealing with this is that one is constantly told of the web, the fabric, whatever, and if you pull one thread, everything is going to unravel. Have there been any discussions, do you have any sense of what they might be prepared to look at, or is it simply that there is just no discussion on this?

Hon. Mr. Kakfwi: Our government leader met with the Premier of Quebec, Robert Bourassa, a couple of weeks ago and brought up our concerns. As I understand it, there was a very flat, definite, emphatic no to dealing with our proposed amendments. They will have to wait until some other time in the future.

Mr. Chairman: Was there any sense that these were valid suggestions or proposals and that there was an opening there for future change? Or was there a feeling that not only was it no at this point but also they really did not want to consider it?

Hon. Mr. Kakfwi: As I understand it, the Premier indicated that the concerns would be dealt with in the next round or the round after the discussions of the premiers, but not at this time within this accord.

Mr. Allen: Let me echo, first of all, one or two remarks that have been made in welcoming you here. This committee is not Premier Peterson's committee; it is the committee of the Legislature of Ontario. We do not consider ourselves, at least my colleague and I certainly do not, to be here to represent whatever the politics of grandeur of Ontario or any other province may have dictated with respect to the conduct of Meech Lake or the Langevin Block discussions.

It is our concern to try and ferret out as best we can the meaning of what happened, to understand the problems that were inherent in both the process and the substance, and to try to respond to those problems. Personally, I am delighted that you are here, that you are helping us with this new task that legislative committees now may well be saddled with in the future of looking at national issues and constitutional controversies and therefore having to draw on national representation to legislative committees like this. You are helping us very much with that process.

1130

I want to ask you, just so I have a sense of the status of your participation in constitutional discussions in Canada at this present time, I have looked through what you have supplied--and I have seen this before but not to have read it carefully--and my perusal of it does not tell me that there is a specific time limit on this. Correct me if I am wrong.

I do see under the second series, section 5, a reference to the fact that you and the territorial representatives from the Northwest Territories aboriginal peoples are to be involved in annual discussions that will be convened by the federal government to consider constitutional matters. Yet you did say in your brief when the time period ran out on these discussions--was there an understood and clear time period that that accord applied to? Is everything in that accord therefore wiped out, both procedurally and substantially, as of some time in the spring of 1986, or does this accord still hold and are you understood constitutionally still to be in process, so to speak, with the federal government in constitutional matters?

Mr. Richard: I did not participate in the March 1983 accord, but my sense of it is that the document has expired, certainly legally and contractually but also politically. You will recall on the issue of aboriginal rights that the premiers threw up their hands and gave up in March 1983.

Although others can articulate the case of the aboriginal peoples much better than I, think about the sense of frustration that the aboriginal peoples had when they went to that last conference of March 1983. We all saw a lot of it on the television. They virtually gave up, saying: "We can't. We are not going to try any more." They learned three weeks later that 11 of them had managed to amend the Constitution of our country, virtually overnight; yet they could not deal with the aboriginal rights and never even got to our agenda items over--what?--three years of conferences.

My understanding of it is that the document has expired. There is not a commitment, and if this resolution passes all the legislatures, we have to start from scratch again to get on these agendas. They are entrenching these new things called FMCs, first ministers' conferences, in our Constitution. Are we going to even be invited? The Constitution says we are not.

Mr. Allen: Have any of the premiers responded in any particular way to the request that you at least be listed in the schedule of the agendas for forthcoming constitutional discussions?

Mr. Kakfwi, you referred to the discussions with Premier Bourassa. Was he prepared to make any commitment at all that it would be possible to place the concerns of the Northwest Territories and other aggrieved groups on the agenda, but particularly your concern about forthcoming conferences? If not, why would there be a problem in his eyes in amending that very small part of the Meech Lake accord? Do you have any sense of where he was at on that

question? That is one possible amendment we could certainly put forward from this committee, for example.

Hon. Mr. Kakfwi: There is an illusion created that our concerns will be taken care of in future constitutional discussions, but there is nothing on paper or by letter that says that. There is certainly nothing from the Prime Minister, who generally convenes and presides over these conferences. As we said earlier, we have no problem with Quebec being more "in" because it has been rather "out" of its own choosing, I guess, and because of poor politicking perhaps in recent years, but we do not think the price should be that we should be more "out" in order to make Quebec more "in."

The fact is that in recent history, since repatriation, the exercise to bring the Constitution back to Canada started, we have been progressively more "out" every year and now we are just about completely "out." There is nothing that assures us that our views will be heard.

As Mr. Richard has said, the immediate concern and the biggest concern we have is the extension of boundaries. Whatever formula we have for the creation of new provinces is perhaps years down the road, but the immediate threat is that we may never get to exercise those options if the provinces convene, say next year, and decide to divvy us up among themselves. That is the biggest problem we have and, of course, having no say, wanting to be part of that formula and wanting and requiring to protect our rights as Canadians and as a political entity to be part of the constitutional conferences in the future.

Mr. Cordiano: Could I have a supplementary to that? I just want to explore very briefly with respect to the first ministers' conference. Both the Northwest Territories and the Yukon were present at the last first ministers' conference held here in Toronto, at which time both territories were given the opportunity to speak at the first ministers' conference. I was just wondering if you could point out for us the way in which that has come about with the federal government. Obviously, it is not entrenched anywhere, but is there an arrangement that has been made over the years or recently? Could you just give us a little bit of background on that?

Mr. Richard: Mr. Chairman, we have with us Bernie Funston, who is a staff constitutional lawyer with our government. I wonder if he could explain the status of those very brief, four-minute appearances we are allowed to make at those conferences.

Mr. Chairman: Sure.

Mr. Funston: Very briefly, it could be described, I suppose, as a conventional arrangement. There are letters between the Prime Minister of Canada and the elected representatives of the Northwest Territories which set out some concessions. The nature of the concession is generally that we would go to such conferences as observers--the first ministers' conferences on the economy, for example--and that we would not participate these days as a member of the federal team, although initially, five years ago, for instance, we were there as a member of the federal team. We go now as an interested party, but we get a little section of time in the federal time to speak.

I might just mention that in 1984 the federal government issued guidelines to their own departments respecting both territorial governments, and I will quote from those guidelines. They say:

"Over the last 15 years, an important evolution has taken place in the arrangements under which the governments of the Northwest Territories and the Yukon are represented at federal-provincial conferences and meetings of ministers and officials. Previously, the territories took part on relatively rare occasions. When they were invited, they were normally represented by federal civil servants or by federally appointed officials from the territories who were made part of the federal delegation.

"The situation is now quite different. The broadening of territorial democratic institutions and the strengthening of public service in the north have given the territorial governments a new capacity to play a more effective role in intergovernment conferences and meetings. For federal-provincial conferences of ministers, it has now become the practice to extend invitations to territorial representatives at the political level."

At the first ministers' level, obviously, where matters directly affect the two territories, they have been given an occasion to speak. From 1982 until the spring of 1987, that was in fact embodied in section 37 of the Constitution, the main conferences, of course, being on aboriginal rights.

Mr. Cordiano: With the entrenchment of first ministers' conferences in the Constitution yearly, I would say you would have a lot of those opportunities to bring matters up on an ongoing basis. We have heard from various people in terms of whether that is a very viable thing and how often we are going to meet on our own Constitution. If it is an annual thing, then obviously it presents a real difficulty for us if we are constantly going back to our Constitution to revise it.

We obviously have a number of areas to look at, and I would say that is one of the things that this committee is grappling with: how to formulate a process by which we can oversee and monitor that annual conference and what role legislatures are to play in that. But certainly there is an opportunity for an enhanced role for everyone.

Mr. Richard: On that issue, it should be pointed out that we have regressed from 1982 to 1987. The 1982 document did call for future conferences, but they were sunsetted. Even in that document there was a requirement for the Prime Minister to invite our representatives if they were going to discuss matters that directly affected us. So you leave it up to the Prime Minister to decide. We do not even have that in this 1987 document. In that sense it is a step backwards.

1140

Mr. Allen: I have another supplementary.

Interjection.

Mr. Allen: The web gets rather tangled from time to time.

I wanted to follow up the question of my colleague Mr. Breaugh with respect to contacts between the territories and the federal government by asking whether our own government, after the first Meech Lake discussion learned of the problems that the territories and other groups were having, made any contact with the territories or territorial representatives, to the best of your knowledge, in order to sound out directly what the nature of those concerns were and how they might be redressed. Were there such contacts between the Meech Lake and Langevin discussions?

Mr. Richard: My recollection is that our legislature, through our Speaker, communicated the thrust of our motion in the assembly prior to June 3, prior to Langevin Block. Our then Government Leader, Mr. Sibbeston, communicated by telex and means like that to the Prime Minister and the 10 premiers. There was no response at all prior to June 3. Our phone calls were just not returned. They went into the June 3 Langevin Block meetings without ever speaking to our people.

Mr. Allen: I find that quite astonishing because it was quite obvious that, for example, the Premier of this province was prepared to shift ground considerably in some respects, especially in attitude, between the Meech Lake discussions and the Langevin discussions. If one talked, for example, with the aides and assistants who were there for the province of Quebec, one learned that they discovered in the first round that the Premier of Ontario was very forthcoming and friendly towards the Quebec delegation and the second time around was almost hostile. In between, some groups had got to him and he was reflecting some nervousness about where the Meech Lake discussion had got to in itself in the earlier round, which leads me to be rather concerned since he had become aware of your concerns and apparently had not been prepared to give voice to them as he had to some others.

With respect to the clause that was used to include some other groups, namely, the multicultural groups and the aboriginal community in a formal way, clause 16, do you view that as a meaningful gesture even on its own ground, and could it have included you specifically in some helpful way?

Mr. Richard: I would answer that in view of the time it took and the magnitude of the problem to draft section 16 to accommodate those other groups, it would not have taken any more time or trouble to accommodate at least some of our concerns. I still view the Senate one and the Supreme Court of Canada one as being simply oversights; those two were not intentional. They could have been addressed as simply as the section 16 request of the aboriginal groups and the multicultural groups. They could have been accommodated, I feel, before June 3, before Langevin Block.

Mr. Allen: Thank you. I have some other questions, more particularly, but I will come back.

Mr. Sterling: I would just like to add my thanks. In terms of the historical context from your point of view, I think it is important for us to have that. Having participated in some of the constitutional conferences before, I have some history of it when I was a minister in Mr. Davis's government.

One question. I do not know whether you answered Mr. Offer directly, but is the most important recommendation, as far as you are concerned, the approval in terms of the provincial status by all the provinces and the federal government? Is that the most important one you would like this committee to recommend against? I know what you have said about the omission on the boundary one, but in terms of what they have done?

Mr. Richard: Mr. Kakfwi and I do not have any authority from our Legislature to prioritize these items, but personally I have said from the outset in May of last year that the extension of boundaries issue is the most important of the five basic issues that we have. I personally put it ahead of the creation of new provinces because, in time, it is going to happen first. It is going to affect us first. It is also the most insulting one of those two. That is my personal view and I think a lot of people agree with me. We do

not really have a mandate to prioritize our request. Thank you.

Mr. Sterling: I do not know what the first ministers agreed to behind closed doors with regard to sticking fast on what had been decided and not opening it up for any potential amendment, but I would imagine the concern they would have is that once the door was open a little bit, everybody would jump in and nothing would be decided.

If the Meech Lake accord was amended, let us say, for purely clarification cases--and you have mentioned the Supreme Court judges, for instance, and whether or not they can come from the Northwest Territories and the Yukon--would groups like yours and some of the native groups be willing to distinguish between the two? In other words, would they say, "We will recognize that there are certain issues on which there are clarifications and we will not come forward with the argument," and then, once the door is open, all the arguments should be heard?

Mr. Richard: Minor amendments versus major amendments?

Mr. Sterling: Yes. I guess what I am trying to do is get some amendment to this particular accord and trying to find out whether or not some of the minor clarification things can be dealt with before it goes through, if they are as headstrong enough to carry on as they appear to be.

Mr. Richard: I do not know. For myself, you know, it is difficult to answer that.

Mr. Sterling: Yes.

Mr. Richard: Are you asking, "If we open the door, will you promise to leave after two minor amendments?" There is one that has been mentioned over here. Why will they not even put our outstanding issues on the agenda? I mean Senate reform and fisheries are there. Why not clauses 42(1)(e) and 42(1)(f)? If you consider that a minor one, then we will move that to treat it in a minor way so that we are entrenched. We are going to go back to the first ministers' conference next year.

I do not know how else to respond to that. I am one Canadian who is vehemently opposed to this rush. We all read in the paper about up in Ottawa they are fighting back and forth between the Senate and the House of Commons on some mundane things like a drug bill and the Canada Post bill. They go back and forth with minor amendments, but yet they will not take the time to amend the Constitution of the country to deal with it in a slower way.

I think the whole process is obscene, the way Canadians, parliamentarians, legislators like you and I, are being rushed into this thing. The most important issue in the country is our Constitution and yet they will not contemplate taking their time. What is the expression that Senator Murray--the "egregious errors." Ask northerners whether they are egregious or not. Sure they are egregious. You know that old expression, "If it ain't broke, don't fix it." I mean this thing is broke and all of us should be taking our time to do it properly.

1150

Mr. Sterling: Your frustration is no greater than the frustration of members of the opposition parties in this Legislature. We are faced with the same problem here; there are six of them and there are four of us, and guess

what is going to happen when the recommendations come forward out of this committee? I will hope that they will listen, but I am certain they have their marching orders. I hope they have listened to you. We just found the whole setup of the committee a problem. We stated that in the Legislature and we agree with your comments in that regard.

Having gone through an election on September 10, and having listened to a number of people at the door--and I represent more people than live in the Northwest Territories, one and a half times that number, I guess--when the Meech Lake accord came up, I did not find anyone who was in favour of it. In terms of free trade, I found people on both sides of that issue. In fact, I found more in favour. I represent a high technology area, which may be part explanation for that issue. On the Meech Lake accord I did not find anybody in favour of it, and more people concerned about it.

Given a choice between it and the status quo, which would you take? Would you prefer what we have and to scrap the accord, period? Are there any positives in it for you?

Hon. Mr. Kakfwi: In my view I think, because Quebec chose to be left out, I guess during Levesque's time, now the political environment is different. Bourassa wants in. I lived in Quebec for a little while during the referendum. I guess I have a lot of sympathy for the nationalism, or the separatism of the day, because I was there. As a Canadian, I am very happy that the accord came about. What I am totally upset about is that these 11 people are telling people like you that, yes, they got Quebec in, which is a great hurrah for them, but they also did some other things which are not good, particularly for those of us who live in the territory. They have taken away certain fundamental rights that we should enjoy as Canadians, but you cannot do anything about those because you are going to screw up the whole deal. I guess my fear is that you are going to buy that pitch. For the life of me, I cannot see why you should, because it does not require those changes in order for Quebec to be in. It has nothing to do with that issue at all.

Mr. Sterling: I guess my feeling on it is that the inclusion or the signing by Quebec of whatever document they may sign is purely a symbolic matter in terms of the actual fact that Quebec is in or out of Confederation, or as part of Canada. They are part of Canada, they participated in previous constitutional conferences, and they only abstained from voting by their own choice. They could have held up their hand at any point when they wanted to. I just do not think, from what I have seen so far in terms of the objections, and the objections from the people in my area, that the symbolic gesture of Quebec joining is worth the tradeoff. I am just asking you your opinion on that. Do you think it is or it is not?

Hon. Mr. Kakfwi: I think it is important because they did not sign one, considered historic document. They chose not to sign. It is important for history and important to Canada, I suppose, that the options be narrowed. As you know, Quebec looked at the option of separating. With the signing I think people who believe in Confederation and Canada as it is, was, or it should be, are relieved in one part and the other part for us, we are even more alarmed.

Miss Roberts: I would like to add my thanks to both of you for coming and giving us an excellent presentation, which has put a different light on many of the issues that I thought were of concern to you:

If I understand your basic feelings, the first one and most important one being your sense of betrayal in the process that occurred leading up to

the Meech Lake accord and to the final signing of the document.

Also, the second thing is your feeling of self-determination. You are here as a Legislature representing many diverse types of people, including an aboriginal group of people, and including all other types of people as well. But you are here, I assume, speaking on behalf of a Legislature. Your concerns are that of a Legislature.

I believe, although I am not a great historian and/or a great constitutional lawyer, that your position in Canada over the past number of years has changed somewhat and, as a result of the Constitution Act of 1982, you felt that certain rights were taken away from you then, that even more rights of self-determination have been taken away from you now.

I would like to zero in on the process. You know what the process has been, the process that is going to occur in the future, do you feel there must be a change, there must be something put in the Constitution to deal with that process, or is it a matter of receiving some type of assurances that have been spoken of, whether they are letters or something like that, that will involve you as a Legislature, as elected people in the process, that is going to continue on, by the sounds of it, every year for the foreseeable future?

We are, right now, carving out what our particular committee is going to be able to do in the future in trying to determine what we can do. What do you, as a Legislature, or as representatives of people, think you can do to help in that process of a living Constitution? Because that is what we have right now. We have a Constitution with many growing pains. Have you thought about that? Have you determined how you would like to participate, or even if you would like to participate as a Legislature?

Mr. Richard: Ideally, we would like to be included as a full participant in those constitutional conferences contemplated by this document, the two types, the economy and constitutional ones. But at a minimum, we feel in terms of process, we should have what we got in 1982, that the Prime Minister is required by the Constitution to invite us if it is going to discuss matters which directly affect us.

Being very parochial, I can say, "What matter could they possibly discuss that is not going to affect us?" It should be in those clauses in the 1987 document to convene these annual conferences. In my view, our participation should be dealt with in those.

Miss Roberts: As a legislative committee? We are not mentioned there as a legislative committee. It is only the first ministers who are to show up, so I assume you would like your government House leader.

Mr. Richard: Yes, but we want, at least, the treatment that you have. At least your Premier (Mr. Peterson) is going to those conferences. We do not have that. But if they are going to expand it to allow for some wider thing, as you are suggesting a committee of each Legislature to participate in these things on an ongoing basis. I am aware that someone at the summer parliamentary association meetings suggested that then, certainly, we should be there.

We get equal representation at the Commonwealth Parliamentary Association. We are very active in those. Certainly I can see we ought to be included in the wider participation that you are speaking of.

1200

Mr. Eves: What would your reaction be to our Premier's statement that any changes made to the proposed accord would be, to quote him, "unbelievably serious"?

Hon. Mr. Kakfwi: My reaction, I guess, is that I hope none of you buy it. This is a plea, if you want to call it that, that you should be equally concerned for those of us who live in northern Canada, in the Yukon and Northwest Territories, as you are about Quebec and any other province. You should not accept the line or the argument that Quebec would be more "out" if you argued that the Yukon and the NWT should be more "in." They are not tied together.

I think you have a responsibility to forget about party lines on a fundamental issue like this. You will notice the Social Credit Party is doing the same thing with Vander Zalm on the abortion issue. The issues we are talking about are fundamental, and you should not buy the line that you cannot mess with this accord because it will unravel. It deserves to be unravelled to a certain extent and it can withstand the unravelling, because the inclusion of Quebec does not demand that the rights of northerners and of Canadians should be compromised. That is exactly what the message is.

Mr. Eves: The statement was made earlier that our Premier has referred to the people of the Northwest Territories and the north in Canada as casualties in these talks. If, indeed, our Premier and other premiers, the 11 first ministers for that matter, are sincere that this has been some sort of a genuine oversight on their part, and somehow you have been dropped along the wayside, to address the rights and concerns that you have, surely they could agree to clarify and improve upon the accord now before it is adopted by all 11 legislatures, by the representatives who have been elected in the 11 different government in Canada? Do you not agree that the accord should be amended first and not at some future meeting of first ministers along the way?

Hon. Mr. Kakfwi: We think we do not have any other avenue. That is why we say it is degrading. We have to come to a committee like yours in a totally different jurisdiction from us and ask you, on our behalf, to momentarily halt the process whereby all the legislatures have to approve the Meech Lake accord.

You do have the power to make fundamental recommendations that can meet our needs and still meet Quebec's needs, but you may have to offend your Premier to a degree. Your measuring stick is there, and if you can do it, we would applaud you for all of history. If you do not, I do not know if history will remind you what you have done later. I do not write the history books, but I am concerned. It is an historical time, and we all have a part to play in it.

We are complacent about it, I guess. Martin Luther King said that it is a measure of a man what he does not in times of complacency but in times of challenge and controversy, and this is such a time.

Mr. Eves: One statement you people made this morning which struck me was that is not just an ordinary bill. Indeed, we are talking about amending the Constitution of Canada here. I could not agree more that this one issue should rise above partisan politics.

I find it somewhat repugnant as a Canadian that other Canadians,

regardless of where they live, are not being treated equally with respect to equal access for appointment to the Senate and the Supreme Court, as you have pointed out, and with respect to changes in their boundaries or to the very fundamental right to become a new province. They are not given the same basic ground rules and equal playing field that other provinces have been given over the period of Canadian history.

There has been much talk in this committee about process, how the process has gone wrong and how we can improve it in the future. I have a suggestion and I hope you will agree that one large step that all members of this committee and this Legislature can take towards improving the process is a free vote on this very nonpartisan matter. Do you agree or disagree?

Mr. Richard: I agree.

Mr. Eves: I have no further questions.

Mr. Allen: Could I just ask whether the Northwest Territories has joined the Yukon in laying a case before the Supreme Court of Canada with respect to those equal rights or, if you have not, are you contemplating doing that? It does seem that there is at least a prima facie case there, that under the Charter of Rights citizens of one part of the country do not have equal access to the processes and rights that are accorded by the charter ostensibly to all Canadians. There is substantial ground for a submission to the Supreme Court for a ruling on that and for inclusion in the process.

Mr. Richard: We have. The Yukon government has launched a case and one of our citizens, Mr. Sibbeston, who is our former government leader, has launched a court case in his own name, arguing charter rights. Both those cases have now gone, on preliminary issues, through the courts of appeal of the Yukon and of the Northwest Territories. Mr. Penikett can speak for the status of his case when he sees you this afternoon. Our Minister of Justice announced earlier this morning that our government is going to seek leave to appeal to the Supreme Court of Canada in our own court case.

Mr. Chairman: Thank you. It is nearly 12:10. We have arranged, if you can stay with us for lunch--there have been some discussions with your staff, and if you are able to stay, along with Mr. Penikett, we will be able to carry on perhaps with some of the members who are free to discuss some of these issues.

I was reminded, when you were talking about the desire perhaps of some provinces to take over some of the territories--the example I thought perhaps you were going to quote, which was very graphic--I believe it was at one of the 1968 conferences that the former Premier of British Columbia, W. A. C. Bennett, actually had a map which came out behind him. In those days, television was not always in colour, but he had a great green expanse for British Columbia, which went on up and took in the Yukon, and he was dubbed the Jolly Green Giant at that point.

When I was first listening to the concerns that you had in that regard and I was trying to think if there were any examples, that one came back to mind. I guess there are a number of things there, as Miss Roberts said, that you have brought to our attention which, quite frankly, as we have been aware of the position of the Northwest Territories and of the Yukon, we have not given a great deal of thought to. We thank you very much for coming today, because you have given us a number of points that we do have to consider.

I would like to make very clear as well, and I just feel this is very important, that as members of this committee, we have to consider the testimony that you and others are presenting to us. At some point, we are going to have to consider a lot of other factors and, obviously, as politician to politician, we have some difficult matters we are going to have to wrestle with. But I do not think there is anyone on this committee who agreed to come on to this committee without saying, "I am going to listen to what people say to me and try to determine, as honestly as I can, where we ought to go."

Obviously, we would all have much preferred if this had come to us without what has happened with the 11 first ministers. We are going to have to wrestle with that, but I think what is important is that the statement you have made today, both in terms of its substance and its feeling, is critical for us to understand as we proceed down the road. We all thank you very much for that. I hope when we do get to the point of our specific recommendations, we will be able to keep in mind our responsibilities and move this forward. I thank you very much for coming.

Just before we break, the clerk has one announcement to make and then perhaps we can head out for lunch.

Ms. Deller: Just to remind you that the brief for the first presentation this afternoon by Tony Penikett was sent to your offices yesterday afternoon, if you could remember to bring it.

Mr. Chairman: Thank you very much. We stand adjourned until two o'clock.

The committee recessed at 12:12 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

TUESDAY, FEBRUARY 16, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

From the Legislative Assembly of the Yukon:

Penikett, Hon. Tony, Government Leader; MLA for Whitehorse West

De l'Association canadienne-française de l'Ontario:

Marchand, Jacques, président

Gilbert, Fernand, directeur général

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Tuesday, February 16, 1988

The committee resumed at 2:06 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

HONOURABLE TONY PENIKETT

Mr. Chairman: The Honourable Tony Penikett, Government Leader of the Yukon, is going to be our first witness this afternoon. On behalf of the committee, Mr. Penikett, I thank you very much for joining us today. I believe you were here for part of the presentation this morning that was made by representatives of the Northwest Territories, so in a sense we are immersing ourselves in some of the views and ideas of the governments from the north.

I know you have a presentation that was given to us yesterday afternoon. We are in your hands as to how you proceed, but please go ahead.

Hon. Mr. Penikett: Thank you. I am pleased to participate in this exercise in northern immersion.

Let me ask you to imagine that one morning Ontarians woke up and found that during the night, nine provinces and the federal government had, at a secret meeting by a lake, decided to suspend this province's membership in Confederation.

What if, perhaps in a fit of pique at Toronto, the other premiers and the Prime Minister of Canada had decided that Ontario could not re-enter Confederation until all 10 concurred? And what if there were no guidelines as to how the discretion of each premier and the Prime Minister was to be exercised on this question?

Surely Ontarians would be more than a little concerned if they found as well that the possibility of other provinces extending their boundaries into Ontario was suddenly a real possibility.

How would residents of Ontario feel when they discovered that they were no longer eligible to be appointed to the Senate or the Supreme Court of Canada? Would their bitterness at this treatment not be even greater when they considered how they had been denied access to or even input into the decision that had transformed their constitutional status?

Would people in this province accept such an arrangement if it were applied to them? I think not. "It couldn't happen to us," you might say. Perhaps not. But that, I submit, is what happened to the Yukon last year in April.

When most Ontarians hear the word "Yukon," they may perhaps think of the land described by Jack London, Robert Service or Pierre Berton. Perhaps members of the committee here picture a land peopled by Indians, prospectors, trappers, dance hall girls, gamblers and gold seekers. There is something of this still in the Yukon Territory, but Yukoners are more than quaint

characters limited by the pages of Robert Service. We are citizens of Canada, and right now we are deeply concerned that our interests, our aspirations are being given short shrift by the rest of the country.

The Meech Lake accord discriminates against tens of thousands of Canadians solely because they have chosen to live north of the 60th parallel. It makes provincehood virtually impossible for the territories, it denies us the right to hold certain specific national offices and it was arrived at without either our knowledge or consent, and we are angry.

The proposal as it now stands states that the unanimous consent of all provinces as well as the federal government must be achieved before a territory can become a province. We know that unanimity has been rarely achieved by the first ministers. Our recent experience with the aboriginal self-government proposal, gives us as northerners no reason to believe that this perfect apolitical harmony will be found in the future, especially when territorial as opposed to provincial interests are at stake.

But even if unanimity were possible, even if the north were over-reacting and all the first ministers decided to smile upon a proposal for provincehood at the same time, how can one justify allowing the representatives of every other region of Canada, except that region most affected, to decide the north's place in Confederation?

Surely this is the very opposite of self-determination. Surely this is a rule fit for a gentlemen's club in the 19th century rather than a democratic society in the 20th. And it is a rule, I suggest, that is ripe for abuse. Decades from now the territories could be a million strong but still be blackballed from the club for reasons of immediate political expediency if, for example, the south felt it needed guaranteed access to the north's oil and gas.

Some have insisted that this is not the intent of the unanimity rule. But then, what is? Why are the rules being changed for new provinces? What was wrong with the method whereby the present 10 joined Confederation? Prior to 1982, the door was open to us. In 1982, the door was closed. Now, in 1987, it has been barred.

We in the north feel strongly that the process by which the accord was reached was a violation of our right to self-determination. The first ministers failed to consult northern Canadians about matters fundamentally affecting their lives. It is bad enough that we have no vote, but to have been granted no voice in this process is simply outrageous.

In the north we feel strongly enough about our lack of input into this decision that we are challenging the constitutional accord in the courts. Our petition seeks a declaration by the court that the absence of consultation is inconsistent with conventional democratic principles, that we were, in short, denied natural justice. We also claim that there is a trust responsibility owed by the government and the Parliament of Canada to the people of the north, a trust responsibility writ larger by our absence from the table.

At present, our action and that of the government of the Northwest Territories are concentrating on preliminary questions of justiciability. Although both actions found some procedural favour at the trial level, both were reversed at the Court of Appeal. But this is not a publicity ploy for us. We intend to appeal those decisions to the Supreme Court of Canada. We are determined to explore fully every possible means for securing our rights as Canadians.

As well as jeopardizing our future constitutional status, the accord also wreaks a present-day injustice on some of our citizens. The territories, unlike the provinces, will not have the right to nominate senators or Supreme Court judges.

Yukoners are pleading today, pleading that you uphold their democratic rights in a way that is consistent with those enjoyed by Canadians from St. John's to Victoria. We urge you to extend to the Yukon nothing more or less than what the accord offers your own constituents.

Specifically, we urge you to amend the accord as presented to this body. We ask that (a) new sections 41(h) and (i) of the proposed amendment be deleted and (b) the word "territories" be added after the word "provinces" in sections 25(1), 25(2) and 101(c)(1) and 101(c)(2), so that Canadians living in the north might be nominated by their regional governments for appointments to the Senate and the Supreme Court respectively.

The deletion of the proposed sections 41(h) and (i) would leave the establishment of new provinces and the extension of existing boundaries to agreements between the federal government and the people directly affected.

I want to state quite clearly here that we are not opposed to the accord as a whole. It is vital to Canada to have Quebec endorse the Constitution as a full partner. Like other Canadians of every region and every political stripe, we are pleased to see national unity promoted through Quebec's signing of the Constitution. But we ask, is it necessary to freeze out the north in order to achieve this? We suggest that the Constitution can be amended to meet Quebec's legitimate needs and yet still allow for the creation of future provinces.

Keeping the door open for the creation of new provinces in the northern territories need not and does not threaten Quebec in any way. We do not work with a limited stock of federalism. To extend the full protection of the Constitution to one jurisdiction does not mean that corresponding rights must be taken from another.

It is understandable that Canadians greet with enthusiasm what appear to be solutions to long-standing constitutional conflicts, but that enthusiasm must not be allowed to blind us to the fact that solutions may be creating new conflicts. Canadian experience suggests that these new constitutional errors will not be remedied easily or quickly. Before we amend the Constitution, the practical implications ought to be clear. We ought to be positive that the proposed amendments will serve the future, as well as the present, interests of all Canadians.

Our national identity has been entwined in the north since the birth of our country. Our national image is built on the majesty of the north. In the eyes of the world and in the hearts of Canadians, the north is integral to the definition of Canada. We in the north wish to ensure that our treatment of northern Canada reflects the kind of country we are, the kind of country we want to be.

I will remind you that Canada at the time of Confederation had only four provinces: Nova Scotia, New Brunswick, Quebec and, of course, Ontario. In contemplation of the creation of the Dominion, the London Resolution of 1865 stipulated that if Prince Edward Island, British Columbia and any other province which might be created from the Northwestern Territories wished to join in Confederation, they be admitted on "equitable terms."

When Manitoba was created, the Constitution Act of 1871 clearly set out Parliament's exclusive authority to admit new provinces:

"The Parliament of Canada may from time to time establish new provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said Parliament."

The subsequent admission of British Columbia, Prince Edward Island, Alberta and Saskatchewan was negotiated directly between each province and the federal government. In not one case was the assent of any other province required.

The existing conditions for entry faced by the Yukon and the Northwest Territories are already far more onerous than those met by any other province. As you know, the Constitution Act of 1982 amended the admission formula so that the seven-and-50 rule applies. The north was definitely being asked to leap higher hurdles than those who had gone before.

At the time of the amendment, northerners vigorously protested the imposition of these new requirements. Every single legislator from the Northwest Territories journeyed to Ottawa to press the northern case. Yukoners, too, voiced their concerns and their outrage.

One of the louder voices came from Erik Nielsen, then MP for the Yukon. In his statement in Hansard on November 26, 1981, he demonstrates that the constitutional status of the north is an issue about which every single northerner feels passionately. Let me quote him:

"For over half a century...the dream of provincial status has been the lodestone of northern hopes. It has been central to the vision of the north which sees the development of the Yukon and the Northwest Territories as the best and brightest hope for Canada's future. When the Prime Minister accepted the inclusion of two clauses in the April accord relating to 'the extension of existing provinces into the territories' and 'notwithstanding any other law or practice, the establishment of new provinces,' he dealt a crushing blow to the hopes and aspirations of thousands of Canadian citizens resident above 60. He gave away what was not his to give--the rights and privileges of Canadians of northern Canada above 60."

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To us in the north the amending of the Constitution in a way which promised to make it impossible for northern territories ever to gain provincial status was a breaking of faith. We do not think we were alone in recognizing the fact that these entry provisions were unfair.

Attached to the 1983 constitutional accord on aboriginal rights, an accord mentioned by our colleagues from the Northwest Territories this morning, was appendix A, an agenda of outstanding items, items unresolved in the 1982 constitutional debate. Obviously, these were items that the federal government felt were of importance as the government wanted to deal with them at the next meeting.

* Agenda item 4 specifically requested the repeal of sections 42(1)(e) and (f), which deal with the creation of new provinces and the extension of provincial boundaries. As well, in its discussion paper on the draft amendments, the federal government stated, "The intention would be that the

onstitution of 1871 would operate rather than section 38(1) of the Constitution Act, 1982." In other words, it was the intention of the Trudeau government, at that time, to remove the impediments to the territories joining Confederation which had been placed in the Constitution at the last moment in 1982.

We in the territories, therefore, believed that the problems in the 1982 formula were apparent to all parties and that there was some consensus that they required change, because nine provinces and the federal government had signed the 1983 accord. The parties to the 1987 accord, unfortunately, did not improve the 1982 formula; they did not correct its unfairness and its inequities; incredibly to us, they made them worse. Seven people who signed the 1983 accord also signed the 1987 accord, completely contradictory positions. So far, we have been given no explanation whatsoever as to why the clear intention of 1983 was reversed in 1987, without, I might add, any consultation with the elected representatives of the people most directly affected.

I would ask you just to consider for a moment the Canada we would have today if the 1987 formula had been applied when the extension of boundaries and the creation of the post-Confederation provinces were being considered. A map of Canada would show only Nova Scotia, New Brunswick and a strip of land along the St. Lawrence River and the Great Lakes. Provinces seeking to maintain the status quo, to protect special interests and to exercise narrow jealousies could have refused the extension of boundaries and/or the admission of new provinces. Our map would show Canada as a small nation state with British territories or perhaps independent nations to the east, west and, dare I say, to the north of us.

Fortunately, earlier federal and provincial legislators had a larger vision of the federation that was to be Canada. They anticipated and encouraged the development of the territories and facilitated their admission into Confederation. We believe that this generosity of vision must be maintained.

Underlying the specific injustices that we in the north perceive is a fundamental wrong. Earlier, I spoke of natural justice and I cannot emphasize too strongly our anger, our frustration, at the denial of our right to be heard and to have reasons given for the decisions made which will affect us.

The leaders of the Yukon and the Northwest Territories were not invited to the original Meech Lake meeting, even though our constitutional fates were as much at stake as were those from any other jurisdiction.

In the weeks following the accord, I contacted each and every Premier to explain our dilemma. We articulated many times our concerns to the Prime Minister's office. Our ministers contacted their federal and provincial counterparts, as have our officials. Even though Mr. Sibbeston, the then-leader of the government of the Northwest Territories and I went to Ottawa on June 1, 1987, we were not invited to the premiers' all-night meeting at the Langevin block.

On the evening before the meeting I finally received our first acknowledgement from the Prime Minister of Canada, a short note promising to represent the interests of the north. His complete failure to do so is what prompts me to continue to seek support for changes to the Meech Lake accord. I repeat, it is fundamentally unfair that our fate, the fate of the people of the north, should be decided by others, by every other region in Canada, by 11

men in a locked room, most of whom have never even seen the north, let alone lived there and known its people.

It is fundamentally undemocratic for our citizens to be denied representation in a process that affects their rights. You would not tolerate it here in your province. Why should you allow it to be imposed on others, your fellow Canadians?

The unfairness of this situation, as Mr. Richard mentioned this morning, was recognized in the recommendations of the special joint parliamentary committee on the accord. Although the majority report did not endorse amending the accord, it acknowledged, in paragraph 39 of chapter XV, "The principle of the 'equality of the provinces' is important but in our opinion, it is carried too far if it imposes artificial and unnecessary constraints on the natural evolution and development of the northern third of the land mass of our country."

We in the north are perplexed and frustrated by the first ministers' apparent disregard for the rights of those of us who occupy the region of Canada so often linked to the country's future wellbeing. The normal evolutionary process of constitutional development would see the Yukon increasingly have the right to self-determination in matters of social, economic, cultural and, of course, political self development, culminating some day in provincial status. Instead we see Canada turning its back on our progress, refusing to acknowledge our rights.

The Yukon and the Northwest Territories are not provinces now, nor do they seek provincial status at this time. Few people in the north would argue that we have reached the point where provincial status makes sense. We are keenly aware of the limitations imposed by our small dispersed population, our limited economic base and our underdeveloped infrastructure.

But this does not mean that additional, artificial limits should be imposed on us or that rights so fundamental to other Canadians that they take them for granted, should be denied. Yukoners quite naturally wish to play a role in the country's major institutions. We want to continue to work for provincehood at some appropriate time in the future. To have that possibility extinguished at this time would erode our faith, not just in the future of the north, but in the vision of this country that Canadians have embraced since Confederation.

Ladies and gentlemen, what we are asking you, the leaders of Ontario, the members of this Legislature, is do you want the north to be part of Canada? Do you accept our right to determine our own future in Confederation or do you, in effect, believe that Confederation is now complete, that there is no more room? Do you admit the possibility of a Supreme Court judge or a senator from the north, or would you argue that Yukoners, who have sent a Speaker, a Deputy Prime Minister and Canada's second woman MP to Ottawa in this century, are not equal to national office?

I believe that your well-known commitment to democracy, fairness and equality should answer these questions for you. Thank you.

1430

Mr. Chairman: Thank you very much, Mr. Penikett, for setting out again, I think very clearly, the concerns which have been expressed from the north. Again, I know that there are good number of questions, so if I might

move then directly to questions, Mr. Breaugh.

Mr. Breaugh: Tony and I have known one another for quite a long period of time and so I think I have a little bit of sense as to what kind of person he is. I want to put a couple of kind of strange questions to you, Tony.

If I were you, what I would want most of all right now, with some urgency, is to regain my proper place at the table. I would like some amendments, I would like some things not to happen, but most of all, I would want back in the game. Of all the things I see happening to the people in the north, the one major hurt--and it is a substantive one right now--is that you thought you had a place at that bargaining table. You thought there was a clear-cut agreement on how to proceed from here, and all of that has been swept away from you. I would be asking the rest of Canada, "Just give me back what I thought I already had, which was a place at the table, a voice during the course of these negotiations and opportunity to put in front of the rest of the country what they already have."

Is that a reasonable summary of where you are at?

Hon. Mr. Penikett: I think that is a good summary. Maybe you would have saved me a lot of time if you had done the presentation.

Having a place at the table, we discovered, is not sufficient. We sat at the table for the years between the 1983 accord, which I mentioned, and March, whatever it was, this year when the process on the aboriginal rights and other matters ended. We were at the table. We had a voice. We were at the table through the ministerial meetings. We were at the table through the first minister's meetings.

I spoke in that caucus, and we were more than ready to get to agenda item 4, which would we thought, on the nod, as a matter of routine approval, have repealed the unhappy 1982 rule on the creation of new provinces, the seven and 50 rule, revert it to the 1871 rule. Nobody in the north expected anything different. That is what we anticipated because nine of the provinces and the federal government had signed it.

It was an incredible shock to us to watch these 11 men lock themselves up at Meech Lake and come out with a new rule affecting our future, with no consultation with us whatsoever. Being at the table once or being at the table twice is not enough. Perhaps even guaranteeing that we would be at the table would not be complete assurance. What Mr. Richard said this morning is true, that as a result of Meech Lake our status has been diminished because now we have difficulty even getting on the agenda for those conferences under the rules for establishing the agenda now.

I do not believe, nor do aboriginal people, I think, believe there will be another aboriginal first ministers' process. For us to have to fight for response somewhere between Senate, fish and other matters is, in our view, an extremely unattractive proposition, especially since we will not even have a voice in the discussions by which this agenda will be drawn up.

We are not optimistic or hopeful at all about that, nor, frankly, are we confident about the proposition that some people put to us, "We will wait till this thing is done and then we will get around to you later," because we do not like what was done to us the last time. To be frank, we have no confidence that matters of vital interest to the territories will be dealt with generously or fairly by a group of people who are dealing with contending

provincial issues.

Mr. Breaugh: Let me try a concept on you that is frankly outrageous, to my mind, but as I read this accord you cannot eliminate it. I want to just get your reaction to it. If one read this document carefully and if one put evil motives on people, one could say that there is no future for the Yukon or the Northwest Territories. Something that Mr. Richard talked about this morning, boundary changes, may seem to be a small matter now but may, in fact, turn out to be something of some great significance.

Is there any feeling in the north that what is happening here is that the provinces will now divvy up the riches of the north, the resources that are yet untapped; that there will be no future development there for the Northwest Territories or the Yukon into provincial status; that the Meech Lake accord rather takes that off the agenda; that you do not have a place to voice your opposition to such schemes; and that several of the southern provinces could simply stretch their boundaries into the north and lay claim to the resources that are there now, that we know about, and others that people are anticipating in the future? Is that a real concern in the north?

Hon. Mr. Penikett: Let me answer your question succinctly. Not in those terms. I will explain why. I do not want to muddy the waters, but I think ex-Premier Lougheed recently made a statement to the effect that provinces, as a result of free trade, will never again enjoy the control over resources that they once had. That was for us a very poignant statement, given that we have never enjoyed that control. We now have a situation where we are never going to, but not because of Meech Lake so much alone but because of a whole series of events.

I have to say personally--and I speak as a Yukoner here and not a resident of the Northwest Territories--that I do not share the same anxiety as Mr. Richard does about the extension of boundaries north. I will explain why.

The Northwest Territories Legislature was not patriated to the Northwest Territories until 1967. If you are a resident of the Northwest Territories, from that point of view, or an aboriginal person in the Northwest Territories, you might say that settler governments, as they are called, have been chipping away at your territory ever since we got here.

The Yukon's perception, I think is very different. We were carved out of the old Northwest Territories in 1898, and arguably, our Legislature is older than that of Saskatchewan or Alberta.

So I would think, notwithstanding Mr. W. A. C. Bennett's lunatic schemes of a generation ago, there is no possibility whatsoever of British Columbia extending its boundaries north and any serious proposal that they do so would, I think, be to invite armed resistance on that score. I do not think I am exaggerating. I think you are more likely to have petitions from northern British Columbia residents to join the Yukon than the reverse. So from our point of view, we have no paranoia on that score.

I forget the gentleman who put the question this morning. but in one respect, Yukoners may be entitled to take comfort from the Meech Lake accord because the fact that you require 10 provinces to consent to such a land grab makes it, it seems to me, a less likely event than when seven or one might have been able to do it on their own.

For us, if you ask me for a hierarchy of concerns, the veto power on the

creation of new provinces is a much more serious concern for us, perhaps because we have always assumed we were closer to provincehood than the Northwest Territories, but perhaps also because I do not really believe that in this day and age--it might have been true at one point--a province could successfully expand its boundaries into the Yukon.

The Northwest Territories are also different, I suspect, because I understand Quebec has some outstanding claims in James Bay and to islands in Hudson Bay, and that is an unresolved issue. Even at that, I think you could argue either way that it is unlikely that the other provinces would stand by and watch Quebec advance those claims. I think it is unlikely that Newfoundland would support such a proposition, for example, given its history.

Mr. Breaugh: One final little remark which I think we discussed a little bit this morning. A lot of people who are elected in the north have been on the road a lot in the last year, seeking to get some information, some clarification, some reasons why these things were done. You went into that somewhat in your presentation and your opening remarks. Has anybody given you any kind of explanation as to why the Yukon and the Northwest Territories were excluded, even when they were knocking on the door while the hearings were under way?

Hon. Mr. Penikett: No good reason has been given as to why we were excluded, except: "That is the way the country is. You guys do not have a vote and the provinces do." Mr. Trudeau changed that though with respect to the aboriginal rights question. Presumably, I think there would not have been terribly much objection, when we were discussing a matter that affected us such as the creation of new provinces, if the territories had been invited in by the Prime Minister. I do not think any province could have reasonably objected had that been done.

The real reason it happened to us, of course, is because we were not there at the table. I mean it is pretty hard to argue convincingly either a paranoid thesis that the provinces were out to get us, if you look at the 1983 accord. In fact, I would argue since the provinces have been so incredibly inconsistent in discussion, for example, prior to 1982, in 1982, in 1983 and then in 1987, I mean they have zigzagged all over the map on the question of the veto power over the creation of new provinces and it was pretty hard to argue that they had any real interest, any real passion, any real consistency or any real intelligence being brought to the question, but I do not completely buy that this was an accident, a casualty, an unintended consequence. Somebody had to have an agenda here. Somebody had to want to have this happen.

Frankly, I think we have not been given the straight goods. I do not know what the straight goods are and maybe there are different agendas in different provinces, but it seems to me that when we are told, "Do not worry about this power being in the Constitution. We do not intend to use it," I have a lot of trouble with that. We are not talking about a municipal bylaw here. We are talking about a power being put into the Constitution of the country. If you tell me, as some provincial Premiers have, that, "We do not intend to use it," then I ask you what the hell do you want it there for? I mean you look me in the eye and you tell me you need this power if you do not intend to use it. They will not and they cannot, or they fall back and say, "We do not want to unravel the accord." We do not want to unravel the accord either. All we want to do is put another buttonhole in the coat.

Mr. Elliot: I would like to begin by thanking you, Mr. Penikett, for a very dynamic presentation. Your presentation, along with the one this morning, I think have been most helpful for me personally with respect to understanding the position of the north.

The second thing I would like to do is to put it a bit in context because I think the people from the north look at Ontario as Ontario, and I think you should realize that people like myself who were raised in Bruce county, and all of my relatives still live in Bruce and Grey, sort of look towards Metro Toronto in the same way that the north maybe looks towards southern Ontario. I would like to relate a story of how I am putting this in context in my own mind, if I may.

I recall as a young man going out on a fishing expedition with my grandfather who was a really dynamic Irishman who owned a farm that bordered on a little village called Desboro up in Grey county. When I drove in the laneway this morning, my grandfather was obviously very agitated and the reason for this agitation I think relates partly to the kind of thing that you and your colleagues have been telling us today.

At the council meeting of the village council the night before a consultant had delivered a plan of action for expansion in the village and they had delivered that morning, just before I arrived, a plan for that expansion. The line that went through my grandfather's farm went right down his lane and split his barn in two. The bullpen and the horses were on one side and the cattle were on the other side. I suspect they could have resolved the taxation problem that was attendant for that kind of division through negotiation, but he suspected very strongly that there were also ulterior motives. In finding out what was involved there, they actually had a game plan to expand the village and were going to use half his farm in doing that.

Now, I think this is sort of the same kind of scenario that we are hearing here today from the people from the north. The vision that comes to my mind from this morning is when somebody who is head of a government or a House leader of a government is knocking on a door to attend a meeting that is going to, in their opinion, adversely affect the whole region and cannot come through the door. That is a fairly dynamic kind of a vision that will stay with me a long time.

My question really is sort of a supplementary to the one Mr. Breaugh asked a few minutes ago. In this morning's discussion, it was fairly clearly stated I think that the territories wanted to negotiate on their own behalf, say for boundary changes, that kind of thing, with the attendant provinces, the federal government and themselves. I am wondering, with respect to unresolved claims or new claims that might come up with respect to natural resources and that kind of thing, whether you feel because of the history of what has happened in regard to the accord so far, the people from the north would be in a better position negotiating with the federal government as their exponent and themselves with the provinces of immediate concern, or whether their position would be a lot safer if they were negotiating with the whole country. I sense that a lot of us feel that we are Canadians first and we would be looking after the interests of persons like yourselves as dynamically as we could, even though our boundaries do not necessarily adjoin with your own boundaries.

Hon. Mr. Penikett: Let me answer the question this way. As frustrating as it sometimes is dealing with the federal government, it is, at least for us, a known quantity. They have a lot of experience in the north.

They have, in fact, for most of the century governed the north for all intents and purposes.

When we are talking about gaining provincial-type powers there, we are not talking about taking something from the provinces, we are talking about devolving powers from the federal government, provincial-type powers. It is fairly easy to negotiate with one player. What is so immensely frustrating about the Meech Lake accord is that it presents for us the absurd possibility that some day, when we want to join Confederation, we have to negotiate not just with the federal government; first of all, we have to negotiate a deal with British Columbia, then with Alberta, then with Saskatchewan, then with Manitoba, then with Ontario, then with Quebec, and so on, and then get to the federal government.

We might go to BC and find it wants something from us in exchange. God knows what it would be. Alberta wants something else, and so on. Newfoundland wants something extra in the way of fish before it would let us into Confederation. Ontario wants to make sure we will never become another Alberta in the question of energy. Quebec wants to make sure, who knows, I cannot imagine what it would be, but it would be one thing or the other. We would become the kind of Namibia of Canada; everybody else governing you except the people who live there.

To me, it would be a preposterous situation for us to have to go cap in hand as a democratically elected government, a people who are entitled, I think, in Canadian terms and United Nations terms to self-determination constitutionally, to have to go begging from all the other provinces. It is bad enough to be a colony of Ottawa, but to have to suffer potentially provincial imperialism as well is galling in a country that calls itself democratic.

I cannot articulate to you how emotional and how outrageous that proposition is. By the time we come to apply to join Confederation, I will make a prediction to you that the population of the Northwest Territories and the Yukon combined will exceed that of Prince Edward Island. The idea that the people there should vote and express themselves in the question of joining Confederation and then have to hawk themselves several thousands miles away to ask the permission of a Premier of a province who has never even been there to join Confederation is outrageous.

Our closest neighbour, Alaska, when it joined the union in the United States, did not have to get Rhode Island's permission. Anybody who suggested they had to would have been laughed out of the state. It is such a monstrously lunatic proposition, from our point of view, in a democratic society unless you want to sanctify some kind of fraternity club rules as a constitutional principle in this country. I could not get into a fraternity in a university even if I wanted to, so I have some faintly dubious notions about that.

Miss Roberts: Neither could I.

Mr. Elliot: I have a supplementary, if I might. I think you addressed the problem with respect to becoming a province, but the kind of thing I was relating to was more like a boundary dispute with a province and how you would stack up with arguing with a province, with the federal government in the mix.

Hon. Mr. Penikett: For the Yukon, I would not be worried about BC having ambitions on that score. If they did, it would not happen. I do not

exaggerate in saying there would be a violent reaction in our territory to such a claim. I am enough of a Canadian and enough of a Canadian patriot to believe that the people of Ontario would not object to such a proposition and, at least on that kind of question, other provinces would be our champions, even though I think, in the normal course of things, we all have a constitutional arrangement where we can be at the table looking after our own interests, rather than having to depend on a proxy.

Mr. Elliot: So you do see an advantage in having the other provinces on your side in that kind of dispute?

1450

Hon. Mr. Penikett: I conceded that and that is the one respect in which I may have a slight difference of opinion with our colleagues from the Northwest Territories, but they have different and quite appropriate historical concerns in this matter.

Mr. Elliot: I understand.

Hon. Mr. Penikett: They have many more provinces bordering them than we do, for one.

Mr. Eves: I note with interest your proposed changes or amendments to the accord on page 10, which seem to be fairly simple and, at the same time, would be very succinct and resolve the problems that you see with the proposed Meech Lake accord.

On page 20 you indicate that in the weeks following the accord you have contacted each Premier to explain your dilemma. We have heard, not only from the Northwest Territories this morning but also from others, that the Premier of Ontario (Mr. Peterson) opposes any changes because he believes they would be unbelievably serious and would in fact maybe jeopardize the entire accord.

We also heard that he indicated to the Northwest Territories that they unfortunately were a casualty of the Meech Lake accord. What was the reaction that you obtained, if any, from the Premier of the province of Ontario?

Hon. Mr. Penikett: In private conversations, he indicated considerable sympathy with our position and I think earlier this morning you heard that at a certain point Ontario may have had some ambiguity about some provisions in the accord. I cannot speak with authority on that.

I know the official position that the Premier has taken in correspondence with me is much more inflexible than he may have appeared in premiers' conferences and other meetings where I have had occasion to talk to him about this. But I also am confident that the Premier of your province takes seriously the process which you are engaged in here. If this committee recommends the simple constructive improvements in the accord that we are proposing, then I believe he would genuinely advance those in the national forums. If I did not believe that, I would not be here.

Mr. Eves: Would you believe the members of this committee will be permitted to have a free vote, totally unbiased by their partisan political stripe?

Hon. Mr. Penikett: I am a parliamentarian, as you are. I know that there is only a limited extent, especially on constitutional matters, to which

I could instruct members of my caucus. I believe that private members in the British parliamentary system are entitled to take a voice and, I think, help to form policy on these things.

The question you are asking implies a criticism of the process by which we came to this accord, and that is a criticism that I would share.

Mr. Allen: Thank you for your very persuasive presentation, which you presented with a good deal of feeling which I think has touched us rather deeply.

A number of my questions have been answered or responded to, but you did touch in passing, in answering my colleague with regard to provincial aspirations, that the government in question that probably had most to lose in terms of powers and jurisdiction was the federal government. I wonder if you have any reason to think it is in that court your problems essentially have lain with respect to the clauses that concern you most; namely, the extension of boundaries and creation of new provinces.

Hon. Mr. Penikett: I think one of the problems is that we no longer know, as we thought we did at one time, what is the process of evolution towards provincehood. At one time, I think we assumed that as our population grew, our economy expanded, our government became more self-reliant, as our financial dependency relationship was reduced with the federal government, we would reach a point, as did other territories or other jurisdictions in this country, where we would apply for full membership in Confederation and we would be granted it.

Along the way, the traditional notion in our territory has been that, as they have been over the years, federal-provincial-type programs have been devolved from the federal government to us. For my party, wanting to avoid the British Columbia example, a settlement of aboriginal land claims was an absolute precondition for provincehood. Having said that, we then thought it would be a matter of internal debate in our community: At a certain point a government would be elected or a resolution would be passed in the assembly or there would be a referendum or something by which our community would express its wish to join Confederation and terms of entry would be negotiated with the federal government. That changed in 1982.

In 1983, we thought that problem was settled. In 1987, all of a sudden, out of the blue, comes this new scheme which, to us, seems to make our long-held constitutional aspirations impossible. Even while that was going on, though, we have been negotiating program devolution with the federal government. Those are often difficult negotiations but they are going on, as are our land claims negotiations--twin track, parallel track--towards something akin to provincial autonomy in our area.

In fact, we are very close to having almost all the powers of a province, except those over natural resources in the Yukon, and I think we are actually very close to an aboriginal land claims settlement. Once we had passed those two points, we always assumed that provincehood would be just a matter of time.

I hesitate to say this but I think we now have reason to fear that if the Meech Lake accord is adopted unamended, we may have some provinces take an unfortunate interest in some of those devolution discussions, from our point of view, entirely inappropriately. They may claim a right, as a result of the Meech Lake accord, to have a voice or to put them on the agendas of the first

ministers' conferences. That, to us, would be an absolute nightmare. I do not exaggerate. It would be a nightmare.

Mr. Allen: Is the natural resources question, in your mind, the sticking point for the federal government?

Hon. Mr. Penikett: I do not think so. Let me say in tribute to this federal government, I think it has been more willing to talk to us about these things than any previous federal government. I actually think that we have been as a government ??sloughing into these issues anyway by following a series of bankruptcies, buying into our ??largest forest products company and taking a role in negotiating development agreements with mining companies. We got into the field without having any constitutional authority, but that is practical politics.

Mr. Allen: One way of getting there.

Hon. Mr. Penikett: Yes. From discussions we have had, I take it the federal government is more than willing to negotiate revenue-sharing agreements or accords governing energy questions. We regard that as quite a positive sign. Unfortunately, it appears entirely contradictory to what is happening in the formal constitutional thing, and that is why I think it is confusing and puzzling for our population.

Mr. Allen: Can I get some information from you? I am not clear on a number of points. First, how much short is your infrastructure of Prince Edward Island's infrastructure? We all know how much federal government transfer payments contribute to that island's economy and its social assistance programs and so on. How much short in reality are the Yukon and the Northwest Territories of that actual state of affairs?

Hon. Mr. Penikett: I do not know Prince Edward Island well enough to make an informed comment, but I think that as a result of the formula financing arrangements we now have with the federal government, the ability to bring in fairly short order--historically, in short order--our infrastructure to a level roughly comparable to Canadians in the south is quite good.

For example, we will be opening a new \$50-million college this fall which will provide substantial capacity in our community to provide post-secondary education north of 60. We now have good roads to all but one of our communities, unlike the Northwest Territories which is still serviced mostly by air.

I think we have made some progress in substantially diversifying our economy. In per capita terms, we are huge exporters of minerals to Asian markets. We have much smaller per capita expenditures on maintaining infrastructure in the Yukon than do the Northwest Territories, where there are different problems. We were settled earlier, we have been in the process of development longer, and I would guess in many ways the quality of our life would be approaching that of people in Prince Edward Island. Perhaps in some particulars it may even be superior.

1500

Mr. Allen: So we are really not looking too far down the road in terms of all realistic assessments of your situation when provincehood would become a reality.

Hon. Mr. Penikett: There is substantial debate by the major parties

in our Legislature on this question. I believe that the major opposition party in our Legislature would put political sovereignty ahead of economic sovereignty. We would do the reverse. For myself, I would not want to be the Premier of a broke province, which is what I think we would be under the existing equalization plan today.

Mr. Allen: This morning there was some reference to the ambiguity of the clause on the senate. Is that because there is some understanding that exists now with respect to allocation of Senate seats to the territories, or is there no such agreement?

Hon. Mr. Penikett: We have senators now, which is part of the problem.

Mr. Allen: OK, I was not clear on that point.

Hon. Mr. Penikett: The question is what happens. Both of them are relatively young men. What will happen when they reach the mandatory retirement age or whatever is unclear to me. I take it, given their age, it is not a matter of great urgency. As you may know, the New Democratic Party position in the Senate means that for us this is not the most urgent of questions either.

Mr. Allen: Quite. Is there a practice at least of consulting territorial governments with regard to Supreme Court appointments? Is there anything of that?

Hon. Mr. Penikett: There has not been to date a Supreme Court judge come from the territories but, as I think our colleagues from the Northwest Territories told us this morning, they have had very well qualified individuals come from their Supreme Court to go to the Court of Appeal.

I think what people take offence at is that the possibility has been denied. To use an American term, every kid theoretically dreams of a chance of becoming president. Well, ??barriers that may present for some kids. I guess Yukoners would like to think in charter terms that all of us have an equal chance, if we are lawyers or members of the territorial bar, of going to the Supreme Court as much as members of provincial bars. On the same score, our citizens should have a chance to be nominated to the Senate by their regional government the same as potential candidates from this province are.

Mr. Allen: Can you tell us anything about Ontario's position in the discussions that were taking place following the accord of 1983 with regard to the admission of new provinces and to the provincial boundaries question? Apparently you have the impression and the territories have the impression we are reaching a kind of consensus.

Hon. Mr. Penikett: It is a puzzling thing. This morning some questions were asked about participation in first ministers' conferences, which I think are much more formal, structured events. Some of you may know that for some years now we have participated in interprovincial conferences of ministers and all sorts of things. In fact, we have hosted some of those conferences.

It is to the federal-provincial conferences which are the most structured and the most formal that we have the most limited access. At first ministers' conferences the territorial leaders are each given 10-minute slots. I understand some of the provincial premiers last time complained that they

did not have much more than that, given the extent to which the Prime Minister dominated the discussions.

We do not see those televised first ministers' conferences as the most important arena, for a number of reasons. We have participated for some years now in the premiers' conferences on a similar basis, although not in the televised sessions, but in the closed sessions. At times when this issue or the constitutional questions have been discussed, they have gone behind closed doors and excluded the territorial leaders.

On the occasions when this matter was discussed, when the consensus was building towards the Meech Lake accord, it was done out of our sight and out of our hearing, so I think we did not understand what was jelling there. In many other arenas, mines ministers, education ministers, health and social services ministers, my ministerial colleagues participate regularly and maintain a substantial contribution. Our roles are not that distinct from the other provinces.

Mrs. Fawcett: I too thank you for your very fine presentation. Unlike those gentlemen you referred to who were locked in a room or had never been to the north, I had the good fortune this summer to spend two weeks in the Yukon, in the Whitehorse area, and I have to say I was amazed. I admit I did not think that Canada had such beauty. I thoroughly enjoyed myself and would love to go back.

In being part of a few conversations, the Meech Lake accord came up and offhand remarks a couple of times referred to the Yukon then as the 51st state. When you got near the end, "Ladies and gentlemen, do you want the north to be a part of Canada?" that just rang right in my head again. Is that a prevalent feeling or was that just the refreshment of the hot summer's night talking?

Hon. Mr. Penikett: Let me tell you, I think most of the people who came in the gold rush were Americans. Quebeckers were the second-largest group, as I recall it. We have several hundred thousand tourists come to the Yukon every year because, as you know, it is an extraordinarily beautiful part of Canada.

Mrs. Fawcett: Yes, it is.

Hon. Mr. Penikett: It is not well known that we have the highest mountains in the country. It is quite a marvellous landscape. Without either of us asking permission of our national governments, for some years now the Yukon and Alaska have done joint tourism marketing. I probably have more frequent contact with the governor of Alaska than I do with any Canadian Premier.

On the day the Meech Lake accord was announced, as a matter of fact, I was flying to a meeting with the governor in Juneau. Our capitals are actually only 300 miles apart, so we are that close. I thought seriously for a moment of telling the press that I was going to start constitutional discussions, just to see if I could get a reaction in Ottawa. I thought better of it and decided not to.

Mr. Breaugh: You are mellowing in your old age.

Hon. Mr. Penikett: I do not think it is a strong feeling. I think Yukoners are good Canadians, but people are angry enough and frustrated enough

to say, "If people in southern Canada do not give a damn, if they are prepared to do this to us and not even ask us before they do it, or even after they do it, if the Prime Minister and the premiers are so contemptuous to not even sit down and talk to us substantially about why they did this horrible thing, maybe we should start looking at our options elsewhere."

I notice that our community is now extraordinarily receptive to visitors from Scandinavia, interesting contacts with Greenland and expanding trade with Alaska. I do not think there are any kind of hostilities, but it is the kind of feeling that, "If our possibility of growth in the direction which we always wanted to go is stunted, maybe we are going to branch out in other directions."

Mrs. Fawcett: The geography alone blends. You are there.

Mr. Offer: Thank you, Mr. Penikett, for your presentation. I think what has happened from your presentation today is that in terms of process, through your presentation you have indicated that from your perspective there are all different forms of discussion and communication with all different levels of government and ministries involved in different governments. What you have been saying is that in the past, even if you were at the table and somewhat a part of the process, it did not help that there was still a problem involved with respect to the process.

Hon. Mr. Penikett: I am not sure I would put it in those terms. I understand and accept, given our present stage of development, that we are not going to have a vote on constitutional matters. That is a given. But I believe that the precedent having been set in the aboriginal rights first ministers' constitutional conference and the aboriginal rights process first ministers' conference, we never expected that we would have a step backwards from that; we would at least be at the table when, to use the words from the 1983 accord, matters affecting our interests were under discussion.

Had we been at the table for the Meech Lake discussions, without a vote but even with a voice, I have enough confidence in the leadership of the territories, whether it was me or my predecessors or the leadership of the Northwest Territories, that we would have been able to bring some common sense to bear and persuade the premiers that what they were doing was insane, as far as our interests were concerned.

On the basis of history, I do not believe you could demonstrate there was any powerful commitment by any of the premiers in any direction on this question. I have cited the equivocations in 1981, 1982, 1983 and 1987. I think the reason it happened mainly is because we were not there, not because we did not have a vote but because we had no voice.

1510

Mr. Offer: To carry on, in the Langevin agreement there is the provision for first ministers' conferences each year. Certainly, they have indicated what is going to be on the agenda with respect to the Senate and fisheries. They have also indicated "and such other matters." I am wondering if you can share with us what you see your role in that ongoing process to be?

Hon. Mr. Penikett: Constitutionally, we have no role. We cannot get anything on the agenda. We cannot get on the agenda. We have no way of even petitioning to get on the agenda, except by continuing to knock on the door. The incredibly frustrating thing to me is that some premiers say, "We will get

to you guys later." Somebody some day will put something on the agenda, but presumably they will all have to agree to it being there. We will not get to say what it is, how it is or when it is, but they will. But even then, do we get included in the discussions? I think, as the Meech Lake accord is now drafted, probably not; at least not formally.

Mr. Offer: Then I ask the question, do you have suggestions with respect to procedural change?

Hon. Mr. Penikett: What we see is that, essentially, Meech Lake freezes us out of Confederation and the processes of Confederation, the constitutional arrangements. If we deal with the question about leaving open the possibility of the territories becoming provinces one day in the way that all the other territories became provinces, then I think we would have less anxiety on that score because we could say that in the not-too-distant future, some day we will be at the table and matters vitally affecting us will get some discussion and we can petition for them. We are playing a role in the premiers' conference and maybe through that door we can have some say.

I think the problem, though, is that if we are creating this new form of executive federalism, this new level of government or new layer of government and are not part of it, our perspective of it would be much the same as I heard private members in the Legislature now. We are going to have arrangements cooked up, deals cooked up, which are going to be delivered to legislatures as faits accomplis and which the legislatures are then going to be told to rubber stamp.

Judging around some of the peripheral conversation I have heard around the Meech Lake process, I expect that legislators in all provinces and in the federal Parliament are going to be increasingly unhappy with that role, increasingly dissatisfied with that process and, at some point, are going to decide they will not stand for it any more. I do not know what the breaking point will be but I cannot see that is going to go on and on and every year the first ministers are going to lock themselves up and then hand the decision out to all the provincial Legislatures and say, "Would you mind whipping this through this afternoon?"

I just do not think it will happen. I think at some point democracy will rear its ugly head. I know it would in my Legislature and I am pretty sure it would here eventually. Somebody somewhere is going to have a minority government and that minority parliament will say "Forget it" to its Premier.

Miss Roberts: I have really appreciated what you have said to us tonight--tonight, time goes quickly--this afternoon. Some terms you use are very frightening to me. "You are freezing us out." You just said that. You used the term that this particular agreement is, I assume, making it impossible for you to join Confederation at any time.

Hon. Mr. Penikett: Practically.

Miss Roberts: OK. From what I have heard from you this afternoon, the political reality you seem to be suggesting is that you are a province; except for having passed the resolution, the referendum, you could stand as a province now.

Hon. Mr. Penikett: With the existing arrangements with the federal government that we have, and given a land claims settlement--which is the one major missing piece for us, given the fact that aboriginal people are between

a quarter and a third of our population--I think we would be a province in all but name.

Miss Roberts: And that really in the past you have been treated as a province to a certain extent when they have been talking about constitutional things, but you have been part of the federal team. Am I right in assuming that?

Hon. Mr. Penikett: Not for a number of years. There was a time when we had access to first ministers' conferences. As Mr. Richard said this morning, we sat as observers in the federal delegation. I think since 1982, which is six years ago, at some point, they refused to do that any more, and at the horseshoe table, the territories for a while sat like a couple of spare nails in the aperture of the horseshoe.

Miss Roberts: Holding it up.

Hon. Mr. Penikett: In the premiers' conferences, the last couple of them, for example, I will give you a couple of symbolic changes. Instead of sitting separate and apart from the table, we have actually sat at the table with the premiers. At the last two premiers' conferences, for example, we have been included in the official portrait of the premiers' conference.

Those things are symbolic at a certain level, but I also know that symbolism plays a part in politics. The territorial leaders have been included. I have seen some movement on that over time. I think the one thing which has been totally contradictory in the normal progression has been the Meech Lake accord.

Miss Roberts: In other words, you are saying that this has taken away the things you thought you had gained?

Hon. Mr. Penikett: In the British constitutional process, I assume it goes something like this: you achieve some kind of de facto power and then somebody comes along and legitimizes it after the fact. There is some kind of legislation or resolution or accord which legitimizes and sanctions it. Very rarely, it seems to me, do you achieve a certain level or standing and then have someone try to roll back your progress and legislate something less than what you had de facto.

Miss Roberts: So the process the Meech Lake accord sets out--and there is a process there--is one you feel is so much less than what you had in 1981.

Hon. Mr. Penikett: It is certainly less than we had with the 1983 accord. The 1983 accord said--I will have to look quickly to find the section--"The Prime Minister shall invite elected representatives of the government of the Yukon and Northwest Territories to participate in discussions of any item on the agenda of the conference covered in subsection 1 that, in the opinion of the Prime Minister, directly affects the Yukon and the Northwest Territories."

The precedent established by that, it seems to me, could have mandated Prime Minister Mulroney to have included us.

Miss Roberts: That had a three-year limit on it, did it not?

Hon. Mr. Penikett: Yes.

Miss Roberts: I wonder why that was put in.

Hon. Mr. Penikett: For reasons I understand very well. They wanted to set a timetable for trying to achieve the aboriginal self-government provision. All of us know about open-ended processes and how long they can go on. In retrospect, that timetable was maybe an unfortunately short one, but that is not something we can change now.

Miss Roberts: In your view of Canada and the federalism we are attempting to create sooner or later, or which we are in the process of creating, executive federalism is not part of it, and most likely is not part of my view, either. What process would you suggest? Legislative committees such as this coming with certain recommendations? How can we do this? This is going to happen every year now, should we live that long.

Hon. Mr. Penikett: Mr. Holtby's suggestion, which I believe everybody here knew well and heard about, is in the long run probably not a bad one. I suspect, for reasons I understand as a first minister, that you need some executive process to move things along in our parliamentary system, to make arrangements at times. Asking all three parties in every single Legislature in the country to come to agreement on things may be a process of guaranteed complete inaction.

I also think, for different reasons, that the Meech Lake accord is going to be practically paralytic when it comes to constitutional change, especially the kind of constitutional changes we make. I ask myself, how many times have we achieved unanimity in Canadian history, constitutionally? I think it has been four, something like that. I think the prospect of achieving unanimity on issues affecting the interests of people who are not at the table, who are not represented, is extremely slight. That, from my point of view, means we are extremely unlikely to get satisfaction from the point of view of the aboriginal rights question or on the question of the evolution of the northern territories.

1520

Miss Roberts: Then what process do you suggest? Put the Meech Lake accord aside for a minute or two. What process do you suggest we should be dealing with?

Hon. Mr. Penikett: The process of cooking up a deal among first ministers and then trying to get the Legislature to rubber-stamp it is wrong. I think the public is best prepared for constitutional debate when legislators have dealt with it first.

That is why I said it could be something like the suggestion of Mr. Holtby that legislators are continually talking about these things too, so that when first ministers come to deal they can be advised by the legislators going into such meetings, and when there is a product, legislatures are not taken by surprise and not expected to automatically approve something which they have not previously discussed.

I do not know how often we will be changing the Constitution in the future, but I would expect that if we had something like that, we would have a better informed public about these issues too, and a greater likelihood of representing something which was a genuine consensus in the community, not just a consensus among the leaders.

Mr. Allen: Can I ask one small question, which may be a repetition?

I just want to make certain I heard it correctly. Did you say that at the end of the discussions that took place under the accord of 1983, it was your sense that the federal government and the participating provinces had come to a conclusion with respect to reverting to the rules of 1871 for the admission of new provinces? Is there any documentation that can pin that down for us?

Hon. Mr. Penikett: This is the 1983 accord on aboriginal rights. Unfortunately, they dealt only with item 1 on the agenda. Item 4 on the agenda was the repeal of clauses 42(1)(e) and (f), the creation of new provinces and extending provincial boundaries. Nine provinces and the federal government signed this accord. The federal background paper--

Mr. Allen: They signed an agreement to discuss that?

Hon. Mr. Penikett: Yes, to put it on the agenda. The stated intention of the federal background paper was, the intention was to repeal the 1982 rule and return to the 1871 standard, which was bilateral negotiations between the provinces and the territories.

Mr. Chairman: I want to be clear on this. On the same question, I want to be clear that what you are saying is that what was signed was not simply an agenda for discussion, although that was part of it, but that in your view, the federal government, at least, was making the recommendation that be changed?

Hon. Mr. Penikett: All provinces agreed to have it on the agenda. The background is that the federal government, having heard the protests from the territories, had agreed to sponsor, if you like, a motion going back to the 1871 rule, and it was our understanding there was no substantial objection from the provinces to doing that. But unfortunately, we never got to it on the agenda.

Mr. Chairman: In the discussions at that time, you mentioned you were not aware of any provincial opposition to that. Did you hear of any subsequently or was it simply not broached at all?

Hon. Mr. Penikett: The direct reference I can find--and I am sorry I cannot cite the reference--there was a Le Devoir article which quoted ??Gilles ??Lemiarre saying something like Quebec wanted to have a veto power over changes in federal institutions, and I think there was something in the article that implied the territories were, from Quebec's point of view, a federal institution.

That is a subject on which, of course, we would have a strongly dissenting opinion. In fact, there is a decision of the Supreme Court of the Yukon in respect to a language matter which ruled that the Yukon Territory is not a federal institution for the purposes of federal legislation and is in fact, in the words of the Supreme Court judgement, "an infant province."

Mr. Chairman: Mr. Penikett, I thank you again for a very thoughtful and forceful presentation. I think I can speak on behalf of all the members of the committee in saying that with our discussions this morning and this afternoon, we are much more aware of the nature of the concerns which are felt very strongly by the Yukon and the Northwest Territories. We are very grateful that you took the time to come and be with us today and to make your presentation. Thank you.

Hon. Mr. Penikett: I can report to our Legislature that you will accept our amendments?

Mr. Chairman: Thank you very much. The committee will take a short, two- or three-minute recess while we prepare for the next witnesses.

The committee recessed at 3:27 p.m.

1532

M. le Président: Bonjour. Cet après-midi, nous avons devant nous les représentants de l'Association canadienne-française de l'Ontario. Avant de les présenter au comité, j'aimerais souligner aussi la présence parmi nous d'un groupe de journalistes de la province de Québec. Je pense que c'est à l'intérieur de l'accord entre l'Ontario et le Québec. Nous voulons souhaiter la bienvenue aux journalistes qui sont ici ces jours-ci et qui sont à l'arrière de la salle pour la présentation cet après-midi.

Alors, nous avons avec nous cet après-midi le président de l'Association canadienne-française de l'Ontario, M. Jacques Marchand, et le directeur général, M. Fernand Gilbert. Sans plus tarder, Monsieur Marchand, cela nous fait un grand plaisir de vous souhaiter la bienvenue à nos délibérations et je pense que la meilleure chose serait de vous passer la parole. Vous pouvez nous dire comment vous voulez procéder.

ASSOCIATION CANADIENNE-FRANCAISE DE L'ONTARIO

M. Marchand: Merci beaucoup, Monsieur le Président. J'ai un texte que j'aimerais vous lire, qui durera environ quinze ou 20 minutes. Ensuite, s'il y a des questions de votre part, je ferai de mon mieux pour essayer d'y répondre.

Comme vous le savez, l'avenir d'un Ontario français est intimement lié à celui du Québec. Une pleine participation du Québec à la fédération canadienne est l'unique garantie de notre épanouissement futur. Aussi les Franco-Ontariens veulent-ils que le Québec se joigne aux autres provinces. Ils voudraient que le Québec participe entièrement au processus par lequel le Canada se dotera d'une constitution qui réponde mieux à la vision qu'a du pays l'ensemble de ses citoyens et ils se réjouiraient d'un accord constitutionnel qui ouvrirait enfin la porte au Québec.

Toutefois, l'Ontario français ne peut pas accepter l'accord constitutionnel de 1987. Il risque beaucoup trop. Ce même accord du lac Meech qui permettrait au Québec de se joindre au fédération canadienne la tête haute, pose un danger sérieux aux autres Canadiens de langue française, qu'il place littéralement hors la loi. Ils sont donc dans l'obligation de faire le choix très difficile de contester cet accord et d'exiger dès maintenant que la constitution soit modifiée de façon à inclure pour eux des garanties formelles.

L'Association canadienne-française de l'Ontario est venue vous présenter ces modifications sans lesquelles les Canadiens risqueraient d'enchaîner notre assimilation. Nous voulons aussi vous parler du profond dilemme que vivent aujourd'hui 500 000 Franco-Ontariens qui ont besoin du Québec pour s'épanouir au sein du Canada.

En créant ce comité et en invitant tous les groupes et tous les citoyens à lui soumettre leurs observations, le gouvernement de l'Ontario a indiqué son refus de se contenter d'un document insatisfaisant. L'accord du lac Meech est loin d'être parfait, tous en conviendront avec notre premier ministre (M. Peterson). Pour les francophones de l'Ontario, il comporte toutefois des lacunes telles qu'il leur est impossible de l'accepter dans sa forme actuelle en attendant des révisions futures.

Je m'éloigne maintenant du texte de notre mémoire, lequel propose les modifications nécessaires, pour vous parler tout bonnement, comme simple Canadien et comme Franco-Ontarien, et partager avec vous nos inquiétudes et préoccupations face à cet accord.

Je ne suis pas juriste et, par conséquent, je ne veux pas vous apporter des arguments juridiques pour vous faire part de nos inquiétudes. Certains vous diront que, juridiquement et légalement, nos inquiétudes sont mal fondées; mais peut-être faut-il vivre une situation minoritaire pour s'apercevoir qu'il y a un quotidien, un vécu au-delà des textes légaux.

Si je pouvais résumer dans une seule phrase nos inquiétudes, je les énoncerais comme ceci: Que veut dire pour nous l'énoncé que le Québec est distinct, et quelles en seront pour nous les conséquences? De prime abord, il semble tout à fait évident que le Québec soit distinct, mais il se distingue de qui ou par quoi? S'il est distinct de nous, il s'en suit que nous sommes distinct de lui. Et si c'est son territoire qui le rend distinct, comment cela est-il différent de l'Ontario ou de Terre-Neuve? Mais si c'est sa langue, comment l'est-il de nous, les francophones de l'Ontario?

Puis encore, le Québec étant distinct des neuf autres provinces, les neuf autres provinces sont-elles semblables? Encore une fois, si c'est la langue qui distingue le Québec des autres, c'est donc la langue qui rend les neuf autres semblables et c'est là, vraiment, où se situe le danger pour nous. Cet accord nous semble beaucoup plus comme la reconnaissance officielle d'une province française et d'un Canada anglais, d'un peuple québécois et d'un peuple canadien anglais.

1540

Following the B and B commission, following the great debate of the 1970s, and following especially the new Constitution and the Charter of Rights, we were led to believe, and were believing, that citizens speaking either official language would feel at home anywhere in Canada from coast to coast. We had believed that here in Ontario this great vision was well on its way to realization. We still believe that it must be so, but with this accord we now ask ourselves whether it was only a vain dream.

Nous pensions que la Charte -- réalisée, soit dit en passant, sans l'apport du Québec -- était le couronnement d'une réalité nouvelle. Quand viendra-t-elle? Nous souhaitions que l'entrée du Québec puisse renforcer les droits des minorités linguistiques, mais le coût en deviendra-t-il plutôt l'élimination graduelle du fait français hors Québec?

On dira peut-être que ce jugement est trop sévère et que rien dans ce nouvel accord ne viendra enlever quoi que ce soit à ce que nous avons déjà acquis. On dira donc qu'on n'a rien changé et qu'on préserve le statu quo. Je vous invite à me suivre et à voir ce que ce statu quo nous donne et ne nous donne pas.

Permettez-moi de prendre mon premier exemple ailleurs qu'en Ontario. Vous connaissez sûrement l'affaire Piquette en Alberta. Est-ce le statu quo qu'on veut protéger que d'avoir à s'excuser pour y parler français à la Législature? De plus, dans cette même province, on vient de déterminer qu'on ne peut pas avoir un procès en français. Qui s'est rué à la protection des francophones?

Lorsque requise, la position du Québec dans de telles situations a été

donnée clairement à plusieurs reprises: entre autres, en 1984 dans le cas Marchand à Penetanguishene, puis dans l'affaire Piquette. Le Québec ne veut pas s'ingérer dans les affaires d'une autre province. Voilà donc quelques facettes du statu quo. Et l'Ontario voudrait signer un accord qui permet une telle chose? Et le fédéral? On nous dira ensuite qu'il n'y a pas cause d'alarme?

Certains nous diront que la situation en Ontario est meilleure que celle de l'Alberta. Sans doute que c'est vrai en ce moment, mais quelle garantie avons-nous que cela va durer?

Pour illustrer mes propos, laissez-moi maintenant vous parler un peu du statu quo en Ontario et nous verrons s'il vaut tant de le défendre. J'aimerais parler plus particulièrement du domaine de l'éducation, car c'est celui où nos droits sont les mieux garantis. Si le statu quo n'est pas satisfaisant dans ce domaine-là, imaginez-vous les autres domaines, tels la santé, les services communautaires, etc.

L'article 23 de la Charte, si important pour nous, a été interprété en Ontario comme s'il nous donnait le droit de gérer nos affaires scolaires. Cependant, dans la pratique et d'après la Loi sur l'éducation, les Franco-Ontariens n'ont même pas la garantie de contrôler leurs conseils d'éducation de langue française. En fait, ces conseils français pourraient être gérés par des Canadiens anglais. Et comment cela peut-il se faire?

Because here in Ontario--and it is probably the only definition of a French-speaking person in legal text anywhere--we have defined a French-speaking person. You see, section 258 of the Education Act defines a French-speaking person in these terms, "French-speaking person means a child of a person..." and it goes on. As a consequence, the unilingual anglophone parent of the children so defined moving here from Montreal because he was forced to send his children to a French school, is clearly a French-speaking ratepayer. As another consequence, and one which appears to be contrary to common sense as I have spoken to you mainly in French today, this definition may exclude me, except, of course, in the broadest sense, we are all children of somebody.

Il y a vraiment deux points que nous voulons souligner ici. D'abord, nous trouvons la définition d'un francophone des plus bizarres. Et par conséquent, nous risquons de perdre le contrôle de nos conseils français d'éducation.

Is this the status quo that we want to protect?

Si inadéquat qu'il soit, le fameux status quo n'est même pas protégé, puisque dans la pratique, comme vous le savez tous, l'application de principes énoncés par la constitution dépend de la bonne volonté des gouvernements.

La situation que nous vivons à Penetanguishene avec l'école LeCaron le démontre bien. En juillet 1986, plus de quatre ans après l'entrée en vigueur de l'article 23 et de la Charte, la Cour suprême de l'Ontario a ordonné la construction de nouvelles installations scolaires à Penetanguishene, afin que nos enfants puissent bénéficier du plein exercice de leurs droits. On aurait pu croire que la province, comme bonne défenderesse de nos droits, procéderait sans plus tarder à exécuter le jugement, elle qui s'engage dans ce nouvel accord à défendre les droits acquis par la Charte. Mais non, la province a d'abord fait appel de ce jugement pour ensuite retirer cet appel. Plus tard, il a fallu retourner devant les tribunaux, en octobre 1987, pour clarifier l'ordonnance.

Vous pensez peut-être que l'histoire finit là, mais détrompez-vous: Il faut y retourner en janvier 1988, et jeudi de la semaine dernière, le ministre de l'Education (M. Ward) annonçait que le gouvernement ferait appel dans cette cause. Le résultat de toutes ces manoeuvres, c'est que six ans après l'entrée en vigueur de la Charte, pas une seule brique n'a encore été posée. Encore une fois, nous nous trouvons des hors-la-loi.

1550

Je pourrais énumérer un grand nombre d'exemples, tous aussi bizarres les uns que les autres, mais je ne crois pas que ce soit nécessaire. Mais si c'est ainsi que l'on traite la minorité d'un des deux peuples de langue officielle, et cela dans une matière protégée spécifiquement par la Charte, comment va-t-on traiter les autres groupes moins bien protégés? Il me semble, même si on se garde bien de le dire, qu'on se dirige inexorablement vers deux "melting-pots". En Ontario, les faiblesses de l'accord du lac Meech pourraient être en grande partie compensées par des engagements fermes du gouvernement à faire la promotion du français à l'échelle de la province.

L'Ontario s'est déjà engagé dans cette voie avec l'adoption de la Loi sur les services en français. La province doit maintenant annoncer clairement ses couleurs et proclamer ouvertement son intention de promouvoir chez elle la culture française. Elle peut le faire aujourd'hui même, en termes bien clairs. Il lui suffit de se déclarer officiellement bilingue et, ce faisant, de faire enchâsser nos droits dans la constitution.

Cela ne viendrait que confirmer et consacrer pour l'avenir le processus dans lequel la province est engagée depuis plusieurs années. Ce geste signifierait que l'Ontario se rallie définitivement au principe de la dualité canadienne qui est à la base de notre pays et qui débordé les frontières du Québec. Il signifierait aussi que la province continue d'exercer son leadership au Canada dans le traitement de sa population de langue française.

L'Ontario a invité ses citoyens à exprimer devant ce comité leur position sur l'entente constitutionnelle de 1987. Par ailleurs, notre premier ministre, M. Peterson, se dit tout à fait réfractaire à l'idée d'exiger quelque changement que ce soit au contenu de l'entente. Nous direz-vous que l'adhésion du Québec est plus importante pour notre gouvernement que l'inclusion de la garantie constitutionnelle de droits équivalents pour ces deux communautés de langue officielle? Ou bien encore, que les plus petits sont appelés à payer pour les plus gros? Selon la formule proposée, c'est nous, les deux millions de Franco-Ontariens, qui paierions cher les frais de l'adhésion du Québec à la constitution. Déjà hors Québec, où sera notre place dans cette nouvelle vision de notre pays? Deviendrons-nous en plus hors Canada?

Qu'on ne se méprenne pas. Nous n'avons aucunement l'intention de nous rendre. Nous sommes décidés à survivre et à participer dans notre langue et dans notre culture au Canada du XXI^e siècle. Nous le ferons avec vous, avec ou sans l'appui du Québec, de qui, à la suite des propos du ministre Rémillard, nous escomptions une meilleure utilisation de sa position de force dans les négociations qui ont conduit à l'entente de juin. Avec vous, nous le ferons chez nous, en Ontario, où la reconnaissance officielle du français doit se faire dès maintenant et où, enfin, nous ne serons plus des hors-la-loi.

En dernier lieu, je voudrais répondre à ceux qui nous demandent ce que ça nous donnerait si l'accord du lac Meech était rejeté. Je vois plusieurs réponses à cette question. Si la volonté politique d'aujourd'hui veut consacrer le concept de deux Canada, il nous semble évident qu'il sera à peu

près impossible de renverser cette nouvelle vision dans l'avenir, d'abord parce qu'elle sera ancrée dans nos lois et coutumes et ensuite parce que, pour le faire, il faudra l'accord de onze parties.

Comme j'ai tenté de le montrer tout au long de mon allocution aujourd'hui, la question pourrait plutôt être: Pourquoi appuyer un accord qui sanctionnerait des situations comme celles que je viens de vous décrire? J'irais même jusqu'à poser la question suivante à ceux-là: Puisqu'ils reconnaissent que cet accord n'est pas parfait, pourquoi faudrait-il engager notre futur dans une vision fausse, et cela par un compromis politique néfaste pour tant de Canadiens et de Canadiennes?

Je vous remercie, Monsieur le Président.

M. le Président: Merci, Monsieur Marchand. Vous avez présenté vos points de vue d'une façon très franche et nous aurons sans doute plusieurs questions.

M. Morin: On a eu la visite du professeur Beaudoin il y a quelques semaines, et puis il nous déclarait à ce moment-là que les Canadiens français hors Québec devraient se réjouir parce que toutes les provinces avaient ni plus ni moins qu'accepté de préserver dans l'entente la dualité fondamentale du Canada. Il soulignait aussi avec emphase que le mot "fondamental" était réellement une victoire pour les minorités francophones hors Québec. Pourriez-vous commenter?

M. Marchand: Je sais qu'il y a eu aussi d'autres experts juristes devant ce comité qui ont été un peu moins enthousiastes, et puis j'ai dit au tout début que nous aussi, nous avons reçu des avis juridiques qui, en résumé, disaient que nous ne perdons rien dans ce nouvel accord et que nous ne gagnons rien. C'est là la base de ce que j'essayais de vous dire cet après-midi: Cela confirme, ça sanctionne un statu quo, et puis pour nous, ici en Ontario, et je crois pour les francophones hors Québec d'une façon générale, c'est complètement insatisfaisant. Je vous ai donné certains exemples pour illustrer ça.

C'est vraiment là qui est le danger pour nous: C'est de sanctifier un statu quo qui deviendra presque impossible à modifier dans l'avenir, et ce statu quo conduit, de notre point de vue, inexorablement vers un Canada anglais et un Canada français. Je comprends qu'il y ait certaines personnes qui ne soient pas d'accord avec cette vision et j'invite ces personnes-là à vivre une situation minoritaire pour se rendre compte qu'il y a peut-être lieu de s'alarmer un peu.

M. Morin: C'est tout pour l'instant.

M. Allen: C'est un grand plaisir d'avoir les représentants de l'ACFO parmi nous cet après-midi pour nous donner leur point de vue à l'égard de l'accord du lac Meech.

C'est vrai, il y a un problème particulier auquel il est nécessaire de faire face en ce qui concerne des minorités franco-ontariennes sous cette entente. Pour ce qui a trait à la situation à Penetanguishene, je pense que c'est toujours un problème que d'avoir le gouvernement payer les décisions ??prises à l'égard de l'égalité des services qui sont jugées en Cour d'appel.

J'ai une petite question. Vous avez souligné la différence entre les paragraphes 2(2) et 2(3) de l'accord, où on donne au Parlement du Canada et

aux Législatures des provinces le rôle de protéger les caractéristiques fondamentales du Canada -- c'est ce que disaient ces paragraphes -- et le paragraphe 2(3), selon lequel "La Législature et le gouvernement du Québec ont le rôle de protéger et de promouvoir le caractère distinct du Québec visé à l'alinéa (1)b)-. Est-ce qu'il y aura un problème, à votre avis, si on ??ajoutait au libellé du paragraphe 2(2) le rôle de promotion pour mettre l'emphase sur le caractère distinct, par exemple, de l'Ontario, qui est principalement anglophone? Oui? Donc, si on donne à l'Ontario le pouvoir d'augmenter son caractère distinct, serait-ce possible que le résultat en soit une province plus anglophone? Y-a-t-il un danger dans cette démarche? Ou avez-vous une autre opinion à l'égard de cette possibilité?

1600

M. Marchand: Je ne suis pas certain que je saisisse entièrement la teneur de votre question. Si j'ai bien compris, vous me dites: Si l'Ontario promouvait sa propre spécificité, est-ce qu'il y aurait là un danger pour les Franco-Ontariens? Si vous le faites en parallèle avec la spécificité du Québec, et puis que vous dites que notre première raison d'être spécifiques ou distincts, ou peu importe le terme que nous employons, est celle de la langue et que nous faisons la promotion de cette spécificité en Ontario, ça voudrait dire, évidemment, promouvoir l'Ontario unilingue anglais et évidemment nous regretterions beaucoup un tel geste.

M. Allen: Donc, est-ce que l'amendement que vous voulez y apporter est un amendement pour l'augmentation de la dualité de l'Ontario et des pouvoirs de la minorité franco-ontarienne spécifiquement dans la constitution à l'égard des droits dans le contexte du dualisme ici en Ontario? Est-ce un tel amendement que vous voulez?

M. Marchand: Oui, nous voudrions que les francophones de l'Ontario, les francophones à l'extérieur du Québec, soient reconnus comme une communauté linguistique et non pas comme des parlants français, parce que, qu'est-ce qu'un parlant français? Je vous ai suggéré que l'article 257 de la Loi sur l'éducation définit un francophone en Ontario, avec les conséquences néfastes pour nous que j'ai illustrées. C'est là qu'est le danger pour nous de parler simplement de personnes hors Québec parlant français et non pas de parler d'une communauté francophone qui aurait des droits collectifs comme communauté.

M. Allen: Oui, c'est très important de souligner le statut des communautés, en ce concerne les droits culturels principalement.

M. le Président: Monsieur Allen, est-ce que je peux ajouter quelque chose dans le même sens? En effet, si je comprends bien, le problème que vous avez avec l'accord du lac Meech, c'est le concept d'une société distincte, parce que vous comme Franco-Ontariens vous demandez: "Où se trouvent les Franco-Ontariens à l'intérieur de l'accord? - En effet, selon l'accord, vous n'y êtes pas.

Jusqu'ici, nous avons parlé avec d'autres personnes, d'autres groupes, par exemple, de certains droits -- de la Charte, des droits des femmes, des groupes multiculturels ou des Indiens. Mais ici, et je veux savoir exactement ce qu'il en est, ce que vous préféreriez, c'est une sorte de reconnaissance des droits communautaires. Donc, au Canada il y aurait certains droits pour les communautés francophones, peu importe les endroits où se trouvent les communautés -- au Québec, en Ontario, en Saskatchewan, au Nouveau-Brunswick. Alors, si je vous comprends bien, il y a vraiment un problème fondamental, d'après vous, avec l'accord du lac Meech. Il ne s'agit pas d'apporter des

amendements. C'est plutôt que vous avez vraiment beaucoup de difficulté à accepter cette idée d'une société distincte, parce que pour vous, ça veut dire que vous êtes à côté, hors la loi.

Mr. Marchand: In no-man's land.

M. le Président: "In no-man's land-, oui. Est-ce que j'ai bien compris ce que vous m'avez dit?

M. Marchand: Je pense que oui. C'est exactement une des modifications majeures que nous voudrions faire faire à l'accord du lac Meech, qui reconnaîtrait les francophones hors Québec comme communauté et protégerait ses droits comme droits communautaires. Et aussi que les provinces et le gouvernement fédéral fassent plus que simplement protéger ce qui existe, mais qu'ils fassent la promotion de cette dualité culturelle.

M. le Président: OK, mais comment est-ce qu'on peut faire ça à l'intérieur de l'accord qui existe? Pensez-vous qu'on puisse garder la reconnaissance d'une société distincte, mais qu'on puisse y ajouter aussi peut-être un quatrième ou un cinquième point sur les communautés minoritaires, soit anglophones ou francophones? Qu'est-ce que vous nous suggérez pour reconnaître cette idée?

M. Marchand: Je ne peux vraiment pas répondre à cette question-là précisément, n'étant pas juriste. Je crois que ce que vous dites reflète nos pensées et je présume qu'il y a des juristes qui pourraient faire les modifications dans les termes qui garantiraient justement ces choses-là. Quant aux termes précis, Monsieur le Président, je m'excuse de ne pas être compétent comme juriste.

M. Gilbert: Ce que j'aimerais ajouter là-dessus, c'est que l'accord actuel reconnaît des individus, la coexistence d'individus, et chaque fois qu'on a reconnu à des individus le droit de vivre, ça ne voulait pas dire qu'on leur a reconnu un droit à des conditions pour s'épanouir. Et c'est là que le concept de communauté devient très important. Comme n'importe quelle communauté, vous allez dire dans une école: "Il nous faut une ambiance, un environnement-". La Charte actuellement, en parlant de la coexistence d'individus d'expression française ou d'expression anglaise, tait cette réalité de communauté ou de conditions pour que ses individus d'expression ou anglaise ou française puissent s'épanouir et vivre raisonnablement dans ce pays.

M. le Président: Je vous comprends.

1610

M. Allen: J'ai l'impression que vous avez un problème avec l'alinéa 2(1)a) sur la reconnaissance de l'existence de Canadiens d'expression française. C'est une expression qui fait référence aux individus mais pas aux communautés. C'est un problème, vraiment, mais c'est le langage de toute la Charte des droits et libertés. C'est une charte qui souligne les droits individuels mais pas si fortement les droits communautaires. C'est un problème, vraiment, d'après moi.

Néanmoins, dans le paragraphe 2(2), selon lequel le Parlement du Canada et la Législature ont le pouvoir de protéger les caractéristiques fondamentales du Canada, etc., dans ce paragraphe, selon votre opinion, quel est le statut du jugement de la Cours d'appel en 1984 à l'égard des droits

d'éducation égaux pour les Franco-Ontariens? Est-ce que la protection accordée par un tel jugement a vraiment la capacité de promouvoir les droits des Franco-Ontariens? Comprenez-vous ma question?

M. Marchand: Je crois la saisir un peu, et ma réponse est que, évidemment, en dernière instance, il y a toujours recours aux tribunaux. Maintenant, c'est vraiment aux législateurs, je crois, d'avoir des lois qui reflètent l'esprit et les droits fondamentaux et qui voient à ce qu'ils soient appliqués. C'est ça qui va, en pratique, fonctionner. Je ne sais pas si je réponds précisément à votre question.

M. Allen: Oui, merci.

M. Morin: J'ai l'impression que quand vous faites l'interprétation du mot "préserver-", ça veut dire tout simplement: préserver, c'est conserver. Pas de progression, ça reste mort. Si, par exemple, je prends le cas de la province de l'Ontario, on peut voir que depuis quelques années il y a des progrès énormes. Je regarde même ce qu'on fait maintenant. Converser et discuter en français, ça ne se faisait pas auparavant; le système de traduction simultanée, ça n'existait pas auparavant; des débats en français, ça n'existait pas auparavant. J'occupais le fauteuil au moment où la Loi 8 a été adoptée. On a eu des débats. Même M. Breaugh a été impliqué là-dedans. Tout le monde lui prêtait main-forte pour que ça passe.

A mon point de vue -- je ne sais pas, j'aimerais écouter votre opinion -- le mot "préserver- veut dire tout simplement: s'assurer que ça va continuer à progresser. Est-ce que c'est ça, votre interprétation du mot "préserver-? Ou est-ce peut-être seulement une question de changer de mot et de dire que les droits seront plus élaborés ou seront ancrés?

M. Marchand: Il est toujours difficile d'essayer d'interpréter un mot vis-à-vis d'un autre. Je suppose que, dans le fond, nous disons... M. Allen faisait référence à l'interprétation de la Cour d'appel en 1984, qui dit d'abord que l'article 23 devrait remédier à des choses. Et puis nous avons des études en Ontario qui disent que pour remédier à la situation des francophones en Ontario, il faut prendre des mesures "affirmatives-. Il faut aller plus loin que de donner simplement le minimum, il faut aller plus loin que de dire simplement: "Bien, forcez-nous et puis vous aurez peut-être quelque chose-. Je pense qu'au coeur de tout ça, indépendamment des mots -- que ce soit "préserver- -- je pense que c'est là que nous mettons l'emphase peut-être sur le mot "promouvoir-, nous autres. Préserver une chose qui nous assimile, comme vous le savez tous, à grande vitesse, que vous appeliez ça... C'est vrai qu'il y a eu des progrès en Ontario; nous en sommes reconnaissants et nous reconnaissons ce fait. Maintenant, je pense qu'on dit qu'il faut aller plus loin que ça aussi et les enchâsser, ces droits-là.

M. Morin: Est-ce que vous voyez le même problème se produire, par exemple, chez nos amis, Québécois anglophones?

M. Marchand: Evidemment moi, je ne peux pas parler pour nos amis anglophones québécois. Maintenant, je suppose toutefois que si nous étions une minorité en Ontario ici mais partie d'une majorité de 250 millions sur le continent nord-américain, nous pourrions vivre dans une situation sans toutes les protections constitutionnelles que nous demandons. Mais évidemment, ce n'est pas le cas. Je crois que ce n'est pas un bon parallèle que de prendre la situation des anglophones minoritaires au Québec et l'interposer en Ontario.

J'aimerais ajouter que presque tout ce que nous revendiquons en Ontario, en somme, au point de vue de droits communautaires et d'institutions francophones, nos voisins dans la province voisine, immédiatement à l'est, les ont. Ils ont le plein contrôle de leurs institutions scolaires, ils ont le plein contrôle de leur conseils scolaires, ils ont des institutions postsecondaires, ils ont des universités, ils ont des hôpitaux, ils ont des services communautaires dans leur langue. Ce n'est pas la langue anglaise au Québec qui est vraiment menacée. Je n'aime pas me rendre le porte-parole des anglophones du Québec, mais je ne crois pas que notre situation soit le duplicata de la situation des anglophones du Québec. Il y a beaucoup d'entre nous, peut-être, qui aimerions avoir les mêmes institutions qu'ont les anglophones québécois.

M. Gilbert: Si vous me permettez, j'aimerais faire une petite analogie entre les mots "préservation-" et "promotion-". Actuellement, il y a les Jeux olympiques à Calgary et on n'a jamais parlé de la préservation des Jeux olympiques ou des sports, on parle toujours de promotion. "Promotion-" a une notion de développement, tandis que "préservation-", c'est comme dans un musée, où on essaie de préserver des biens, une culture, etc. Je n'ai jamais entendu dire qu'un promoteur de boxe, c'est un préserveur de boxe. Alors, je pense que dans le fait ou dans l'utilisation quotidienne, même ces deux mots-là, je pense que tout le monde saisit qu'il y a une différence énorme, que "préservation-" n'implique pas les notions de développement et d'épanouissement.

M. le Président: Merci. Jusqu'ici, l'ACFO a parlé avec les Acadiens et les autres groupements minoritaires dans une sorte de front commun sur ces questions. Ce que vous nous dites aujourd'hui, est-ce qu'on peut dire que ça représente aussi le point de vue des Acadiens, par exemple?

M. Gilbert: Plus ou moins.

M. Marchand: L'ACFO, comme vous le savez, est une des composantes de la Fédération des francophones hors Québec, et la réponse à votre question est oui, la position de la FFHQ est analogue à la nôtre pour ce qui est de l'accord du lac Meech, et la FFHQ fait les mêmes revendications, si vous voulez.

1620

M. le Président: Avez-vous parlé avec le gouvernement fédéral au sujet de ces revendications?

M. Marchand: Au niveau de la FFHQ, assurément, oui.

M. le Président: Qu'est-ce qu'on vous a répondu?

M. Marchand: Spécifiquement, qu'il est très difficile en ce moment de penser à des modifications à l'accord du lac Meech.

M. le Président: OK. En avez-vous parlé avec les représentants du gouvernement du Québec?

M. Marchand: Le premier ministre du Québec a rencontré les représentants de la FFHQ à Moncton, je crois, en octobre ou novembre -- je n'y étais pas présent -- et, de ce que je comprends, il a suggéré que dans un deuxième lieu, on puisse revenir et essayer de régler les problèmes des francophones hors Québec, des minorités linguistiques.

M. le Président: Est-ce que ça vous donne confiance?

M. Marchand: Non.

M. le Président: Je pense que c'est vraiment un point extrêmement important dans le développement constitutionnel de notre pays, en ce sens que dans le passé il y avait beaucoup de Québécois -- l'Union nationale, les libéraux -- et ils ont toujours dit: "Bon. Vous, anglophones dans le reste du Canada, vous allez toujours nous dire que nous devons protéger les minorités hors Québec, c'est notre rôle-. Alors ici, nous avons la société distincte, qui donne quelque chose au Québec. On n'est pas exactement certain de ce que ça donne, mais ça lui donne quelque chose. Et vous, en étant francophones hors Québec, vous avez la forte impression que vous avez vraiment perdu quelque chose.

M. Marchand: Nous avons l'impression que depuis disons dix ou douze ans il y a une vision au Canada qui dirige le Canada vers un pays où on reconnaîtrait formellement l'existence de deux peuples linguistiques différents, et avec l'accord du lac Meech, nous prévoyons peut-être que la vision va changer, que tout à coup nous avons une province française qui se dit unique et distincte des autres. Là nous disons: "Bon. Les autres sont quoi? Ils sont semblables de par leur langue-. Et puis c'est là que nous voyons une division sur une base linguistique qui, pour nous, pose un danger sérieux, et sans la promotion et d'abord la reconnaissance que notre communauté existe et devrait être promue, nous avons de sérieuses réserves quant à notre avenir.

M. le Président: Mais à mon sens, il y a peut-être un problème de base aussi avec la position du gouvernement du Québec, que ce soit le gouvernement Bourassa ou un autre -- pas un gouvernement séparatiste, mais un autre parti peut-être nationaliste mais fédéraliste.

Je ne sais pas s'il serait possible d'en arriver à une sorte de compromis entre ces positions, car j'ai l'impression que le Québec veut vraiment -- on en a parlé très souvent -- mettre la société distincte dans la constitution. L'accord du lac Meech va le faire. Alors, je cherche le moyen de garder la société distincte, ce que le Québec veut garder, et en même temps de donner quelque chose aux minorités, que ce soit aux anglophones au Québec ou aux francophones hors Québec, un statut quelconque, un statut communautaire peut-être, qui protège et promeuve leur épanouissement, leur avenir. Mais je pense que ça sera très difficile à faire à l'intérieur de l'accord du lac Meech et c'est pourquoi, d'après moi, votre présentation attaque directement le fond du lac Meech, plus que n'importe quelle autre présentation jusqu'ici devant notre comité. Je veux bien comprendre ce que vous venez de nous dire.

M. Marchand: Vous semblez l'avoir compris parfaitement.

M. le Président: Bon.

M. Morin: Croyez-vous qu'il devrait y avoir -- parce que ce qui est important, c'est que le Québec se joigne à l'entente, et les Québécois s'y sont joints -- une espèce de porte, une espèce d'ouverture qui devrait exister pour dire que plus tard nous allons revenir et rediscuter cette question que vous avez apportée, la question de préserver, de changer de terme -- autrement dit, à la deuxième ronde? La première ronde, c'est d'amener le Québec avec tout le reste. A la deuxième ronde: "Il y a des problèmes, ce n'est pas parfait. Revenons et rediscutons.-"

M. Marchand: Je l'ai posée, cette question-là, à l'intérieur de mon texte, d'une façon indirecte peut-être, en disant: Est-ce l'adhésion du Québec est vraiment plus importante pour notre gouvernement que la reconnaissance des droits fondamentaux, des reconnaissances plus formelles de nos droits fondamentaux comme communauté minoritaire, minorité linguistique?

M. Morin: Ou est-ce qu'on pourrait dire aussi que c'est un début à des discussions futures?

M. Marchand: Je suppose qu'on peut toujours croire qu'il y aura un demain. Cela fait 200 ans que moi et mes ancêtres y croyons. Maintenant, la difficulté est là. On dit, c'est difficile aujourd'hui. Moi, je me demande pourquoi ce serait plus facile de le faire dans l'avenir, une fois que ce sera ancré dans nos coutumes, dans nos lois, et d'autant plus qu'à ce moment-là, ça prendra l'accord de onze participants. Alors, si c'est si difficile aujourd'hui, je ne vois pas pourquoi ce sera plus facile dans une deuxième ronde. Et quand? Je crois tout de même qu'il y a déjà une deuxième ronde de prévue pour d'autres matières.

M. Morin: N'y-a-t-il pas un danger, Monsieur Marchand, que si l'entente n'est pas ratifiée, le Québec revienne et puis dise: "Bon. On vous l'avait dit. Ils ne veulent pas l'avoir."

M. Marchand: Alors, c'est la situation d'être entre un roc bien dur et un poêle bien chaud. Quelles seront les conséquences si l'accord n'est pas ratifié? Elles seront peut-être désastreuses. Moi, j'essaie de vous dire que si l'accord est ratifié tel quel, pour nous elles seront désastreuses.

Alors, vous allez me dire: "Est-ce que c'est moins désastreux pour moi si le Québec ne s'y joint pas que si le Québec s'y joint et crée les situations et sanctionne les situations telles que je les ai décrites? - C'est un dilemme; j'ai dit au tout début que j'étais ici pour discuter du dilemme bien profond qui risque vraiment notre assimilation. Je crois que nous n'avons pas 20 ans, là, pour ça. Si les instances politiques aujourd'hui nous disaient, "Ne vous inquiétez pas; dans 18 mois, voici ce que nous allons faire-, et que ça répondait à ces choses-là, peut-être qu'il y aurait lieu d'espérer. Mais je ne pense qu'il y ait personne aujourd'hui qui soit en mesure de faire de tels engagements.

1630

M. Gilbert: D'ailleurs, on a un exemple de cela à Ottawa, actuellement. Le gouvernement vient de retirer, dit-il, temporairement en deuxième lecture la loi C-72 sur les langues officielles et qui, de l'aveu même de nos représentants à Ottawa, nous disait que ça allait venir compléter, renforcer les droits, entre autres, des minorités. Bon. Tout le monde sait ce qui est en train d'arriver. Alors, c'est inquiétant pour nous et je pense que c'est actuel. Que va-t-il arriver de cela? Si une poignée d'individus réussit à réinterroger, disons, à faire qu'un gouvernement tente de clarifier encore sa position dans l'évolution ou dans l'avancement des travaux sur une loi aussi importante pour nous et la retire, que va-t-il nous arriver?

M. Allen: Vous avez raison de dire que la différence entre les mots dans les paragraphes 2(2) et 2(3) signifie une grande différence pour la préservation d'une minorité en Ontario et la promotion d'une autre minorité anglophone au Québec. Est-ce que les premiers ministres ont construit assez d'articles si différents avec de différents mots? Est-ce qu'il y a un objectif, est-ce qu'il est nécessaire de soupçonner un peu les raisons d'Etat ou quelque considération importante pour nous?

M. Marchand: Ce serait loin de l'esprit de l'ACFO de soupçonner les motivations qui n'étaient pas exprimées. Non, je pense que, comme je le disais tantôt, les difficultés sont énormes maintenant. Elles ne le seront pas moins non plus, à notre point de vue, dans un avenir indéterminé.

M. Morin: Avez-vous eu des consultations avant la rencontre des premiers ministres? Avez-vous rencontré certains groupes pour discuter de ce qui allait se passer? Vous a-t-on consultés?

M. Gilbert: Avant la rédaction de ce nouveau texte?

M. Morin: Oui, le lac Meech.

M. Gilbert: Cela fait quand même... comme beaucoup de collègues ici dans la communauté qui sont impliqués, et à ma connaissance, il n'y a pas eu...

M. Morin: Avec des gens du Québec? avec des gens du Nouveau-Brunswick? avec d'autres? Aucun?

M. Gilbert: Du gouvernement?

M. Morin: Oui.

M. Gilbert: Venir chercher des opinions?

M. Morin: C'est ça.

M. Gilbert: Pas à ma connaissance. Nous avons quand même fait parvenir, par l'intermédiaire de la FFHQ, un certain nombre de...

M. Morin: De mises en garde?

M. Gilbert: Oui, de zones sensibles qu'il serait souhaitable de corriger, mais...

M. le Président: Mais entre le 30 avril et le 3 juin, est-ce vous ou la Fédération avez essayé de parler soit avec le gouvernement fédéral ou avec les gouvernements de l'Ontario ou du Nouveau-Brunswick au sujet de ces mêmes ennuis?

M. Gilbert: Par l'intermédiaire de la FFHQ, il y a eu quelques rencontres, des contacts avec des hauts fonctionnaires, et je crois même avec des ministres et des politiciens du fédéral.

M. le Président: Qu'est-ce qu'on vous a dit?

M. Gilbert: Il est difficile à ce moment-ci de vous dire exactement ce qui a été dit, car ce sont deux textes différents, celui du lac Meech et celui du mois de juin. C'est-à-dire que le lac Meech nous en donnait plus, parce qu'il parlait de communautés, il y avait cette reconnaissance; et au mois de juin, soudainement, cette reconnaissance n'y est plus. Donc, c'était vraiment beaucoup plus satisfaisant, l'entente du mois d'avril au lac Meech, que la deuxième entente du mois de juin au bloc Langevin.

M. Allen: Vraiment, c'est notre jour pour les hors-la-loi.

M. le Président: Oui, c'est ça.

M. Allen: Je me demande si tous ces hors-la-loi font front commun en ce moment contre l'accord du lac Meech. Notre Président vous a demandé si vous étiez d'accord avec les Acadiens, par exemple. Est-ce qu'il y a des discussions avec les autres hors-la-loi, comme les groupes dans les territoires, etc., pour faire front commun contre l'accord?

M. Gilbert: Pour ce qui est de la Fédération des francophones hors Québec, les présidents se sont rencontrés, en ont discuté et se sont tombés d'accord, ce que M. Marchand vous a souligné tout à l'heure, que la position qui vous a été présentée reflète l'état d'esprit des communautés francophones à l'extérieur du Québec. D'un océan à l'autre, nous sommes très inquiets.

M. le Président: Je voudrais vous remercier infiniment. Votre présentation était très claire, très franche. Vous nous avez donné des questions et des idées bien originales sur l'accord, idées que nous n'avions pas entendues avant aujourd'hui. Je pense surtout à l'aspect des communautés minoritaires hors Québec. Nous allons certainement étudier votre mémoire à fond d'ici la présentation de notre rapport. Mais au nom de mes collègues, j'aimerais vous remercier infiniment pour le temps que vous avez pris pour rédiger et présenter vos commentaires cet après-midi. Merci beaucoup.

M. Marchand: Nous vous remercions aussi, Monsieur le Président.

Mr. Chairman: The committee will stand adjourned until tomorrow morning at 10 o'clock here.

The committee adjourned at 4:20 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, FEBRUARY 17, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

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Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Sterling, Norman W. (Carleton PC) for Mr. Harris

Clerk: Deller, Deborah

Witnesses:

From the Social Planning Council of Metropolitan Toronto:

Patterson, Jeffrey, Senior Program Director

Coles, Stuart, Elected Vice-President, Board of Directors

Individual Presentation:

Barnett, Gayle

From the National Congress of Italian Canadians:

Castrilli, Annamarie P., Lawyer; with Houser, Henry, Loudon and Syron

Delfino, Angelo, First Vice-President, National Level

From the Toronto Jewish Congress:

Lenkinski, Lou, Chairman, Social Policy Committee

Scheininger, Les, Past Chairman and Member, Social Policy Committee

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, February 17, 1988

The committee met at 10:07 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: I would like to welcome everyone to the next session of the committee. I would like to invite representatives of the Social Planning Council of Metropolitan Toronto to come forward and sit along the front.

We have with us this morning Jeffrey Patterson, senior program director, Stuart Coles, elected vice-president, board of directors, and Jodie Orr, the executive director of the social planning council. I think the best thing at this point is if I just turn the microphone over to you, and please proceed in whatever fashion you would like to proceed. After your remarks, we would like to have an opportunity for some questions, if we could.

SOCIAL PLANNING COUNCIL OF METROPOLITAN TORONTO

Mr. Coles: My name is Stuart Coles. Jodie Orr is on my right and Jeffrey Patterson on my left. They are here to answer the questions. I am here to introduce the document, which is distilled really out of years of struggle and reflection by the social planning council on how social policy retains a strong role in the formation of national policy, because the cities do not have much independence in this area. Though our warrant is a Metro-wide warrant, we have to struggle with negotiations between federal and provincial authorities or our own case is lost in terms of what is good for the people and the communities making up Metro Toronto.

First, some pink pages which give you a page and a half or so of credentials for the council and outline some of its major activities, some of its major investments in years gone by and in recent times on the questions that are in many ways concentrated into the question of constitutional reform which is before your committee.

Perhaps just to mention two components in those pink paragraphs, one has to do with research and information, in which the council has quite a notable record. You will see some of the instances of that work in the first indented paragraph on the first of the pink pages. That is followed by the other side of our work, which has to do with what you do with information and analysis. You will see a roster of groups at the bottom of pink page 1, where the social planning council teams up with other energies and other concerns in the community to try to implement the information and analysis that have been put together.

If you turn past the pink pages, you will see a table of contents. This perhaps gives you a quick sense of the makeup of our document. There is an introduction and recommendation, which I will read. Then there are other sections following on the Meech Lake accord and the national objectives and their being face to face with Canadian social policy and programs. Then there is some comment on section 106A and a conclusion, which we would like to make sure we get to.

May I take you then to page 1, introduction. Starting about the middle of that paragraph, at the top of the page, the Meech Lake accord potentially alters fundamentally the future nature of Canadian social programs and the meaning of Canadian citizenship. That is really what caused us to ask for some of your time in this committee.

You see there a citation from section 106A: "The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with national objectives."

Much of our brief really is asking concentrated attention to that paragraph from the accord.

Immediately following confirmation of the Meech Lake accord, the social planning council wrote to the Premier of Ontario and the Prime Minister of Canada expressing our concern that this agreement potentially results in a balkanization of social programs across Canada to such an extent as to alter the essence of Canadian citizenship.

Premier Peterson replied to that letter from us and you will see the substance of his reply there. I think I would like to just go to about lines 5 and 6 on page 2, where he makes a very notable reference to "...making constitutional amendments both difficult and in some cases impossible." I guess, at variance with Premier Peterson's statement, the council does not see that the accord makes that matter better, but makes it worse. We have two or three special dimensions to that concern, such as what it means for women and what it means for native people.

While this council certainly agrees with the value that the Premier cites of bringing Quebec, which essentially represents one of Canada's founding peoples, into the constitutional fold, we are not as confident that the level of co-operation required to ensure a level of continuity in social programs compatible with a sense of common Canadian citizenship will be forthcoming without changes in the wording of section 106A.

If interpreted too broadly, or if national objectives for a particular program are not well enough developed, any provincial activity might qualify for compensation. A province might claim funds for child care, for example, and use them to support kindergarten programs; or funds intended solely for child day care provided by nonprofit operators might be used for care provided by commercial operators.

Some of these possibilities were identified in a public forum sponsored by our council in October of last year. Professor Al Johnson of the University of Toronto, department of political science, former president of the CBC and Deputy Minister of National Health and Welfare for Canada, indicated that he did not think Canada's current health insurance system could have been put in place under the terms of the Meech Lake accord.

Lise Corbeil-Vincent, co-ordinator of the Canadian Day Care Advocacy Association, said her organization was concerned that commercial day care centres might receive government assistance. National social policy columnist Leonard Shifrin indicated that the phrasing of section 106A was left purposefully vague to satisfy the demands of certain premiers, other than the

Premier of Quebec, who were in disagreement with the social policy sentiment prevalent across most of Canada and in the majority of provinces.

The potential outcomes of section 106A are not all negative. The establishment of national objectives could open up exciting possibilities for collaboration in meeting critical national objectives such as reduction in the number of Ontarians and Canadians living in poverty. Perhaps you know that number is a very terrifying reality in our national life.

Such a creative and national exercise would move away from narrow administrative criteria and towards exciting objectives. I brought my two colleagues along to help you figure out what those exciting objectives might be. We now want you to notice the recommendation.

We accept the framework in which shared-cost programs in areas of exclusive provincial jurisdiction have been developed in the past. We are of the opinion that constitutional changes, which would diminish the ability to reach federal-provincial consensus around social programs, should be discouraged. Difficulties with respect to retaining the criteria that form the conditions for provinces to receive cost-sharing revenues for medicare programs demonstrate both the fragile nature of federal-provincial negotiations and the importance of retaining the ability of breaking an impasse should one occur.

These complex matters cannot be resolved quickly. Social programs in health, income security, income training, social services and education are on the verge of major reform and their standards and objectives require clear specification.

The Social Planning Council of Metropolitan Toronto therefore recommends that the spending power clause, section 106A, be identified for further clarification by the federal and provincial governments with participation by the nongovernment community that often delivers social programs in partnership with government.

This reservation need not delay the passing of the accord. Approval of the clause might be deferred for a period of time following proclamation of the accord and be subject to the ratification of an interpretive document.

On page 5, "Other Sections of the Meech Lake Accord," you will notice the second paragraph under that heading. It refers to women as somewhat underrepresented at the Meech Lake accord. Therefore, a great concern of the council and many of its member agencies is that this matter needs to be remedied. The council alerts the select committee to ensure that the accord does not affect adversely the rights of women, minority groups and others protected by the Charter of Rights, otherwise one of the most significant accomplishments of the Constitution Act of 1982.

One of the most controversial areas of the accord is the suggestion that the linguistic duality/"distinct society" rule of interpretation included in the accord might be used to override particular charter rights. This question has been raised most extensively by groups representing women, but the concern applies as well to all persons who rely upon the equality guarantees of section 15 of the charter.

There is a reference there to a Supreme Court case that we think is hard evidence for our concern in that matter.

If you turn to page 6, summarizing that concern are the last lines of that paragraph at the top of the page. We strongly affirm the notion that gender and other equality rights, where they exist in the charter, be treated as paramount in all situations. That is one of our fundamental concerns.

We also go on here to cite another group that happened to have a surprisingly large presence in Metro Toronto but not often recognized, the native people.

The social planning council is also concerned that constitutional issues that directly affect aboriginal people deserve continued prominence until solutions are identified and implemented. We draw your committee's attention to the conclusions of the Report of the Special Joint Committee of the Senate and the House of Commons with respect to aboriginal rights.

Perhaps I can assume that you have those on record. If not, please note the five excerpts from that report that we think are to be dealt with very urgently. They should be taken into account in Ontario's response to the Meech Lake accord.

1020

I suggest that you go over to page 13 and see our conclusion. We urge the select committee to report the following:

1. That support for section 106A of the constitutional accord be reserved by the government of Ontario pending further clarification of its provisions. Such clarification might take the form of an interpretive document and this document could be concluded up to two years subsequent to the accord.
2. That the gender and other equality rights in section 15 of the charter take precedence over the linguistic duality/"distinct society" rule of interpretation.
3. That further meetings which attempt to resolve differences between federal and provincial governments and aboriginal peoples be scheduled prior to the coming into force of the constitutional accord.

That is a quick run through our submission and perhaps you have questions.

Mr. Chairman: Certainly, the various parts that you were not able to touch on specifically we, of course, have them on paper and will be able to review them. I will move then to questions.

Mr. Breaugh: Three quick questions from me. In your first conclusion talking about section 106A, I read that basically that you understand that we do a lot of things on a shared-cost basis. We establish different standards and we do everything from building roads and arenas to providing social service programs and pension funds. All of that is pretty common ground in Canada.

I take it that what you are saying there is that you would like to see some of the fine print on this before you proceed. You are not rejecting the concept that is there but you would like to have a more specific principle established before you proceed along those lines.

Mr. Coles: Perhaps Jeffrey would like to respond to that.

Mr. Patterson: Only to say that, of course, section 106A refers only to programs in areas of exclusive provincial jurisdiction, which are almost always social programs. I think you will see, in the parts we did not get a chance to read in the time we were allotted today, that our concern is that terms such as "principles" which occur in the actual wording of the accord do not include what we consider enough.

Mr. Breaugh: You want a better definition of that.

Mr. Patterson: We would like perhaps a more inclusive definition. What we suggest in those pages is that standards and objectives and conditions, as well, these things which could be included within that definition.

Mr. Breaugh: Let me just pursue that a bit. You are not afraid of the idea, for example, that Ontario always has taken federal money that is given to the province specifically for some shared responsibility, put that through a general revenue fund and the reality may be--

Mr. Patterson: Not at all. We say we accept what has happened in the past.

Mr. Breaugh: So that is no problem.

Mr. Patterson: We are worried about future changes that would limit what could be done in the future.

Mr. Breaugh: The second point I wanted to pick up on with you is that many of us read this accord in different ways and that appears to be causing a problem. My reading of it is that there is nothing in this accord which removes any rights which you got, say, in the charter, but that is not as clear as it ought be, and there are certainly a number of groups who are struggling with that notion. They appear, in other words, to have lost some rights under this accord that they had just recently gained.

Would you, for example, be satisfied if we could design a reference of some kind to the Supreme Court which would clearly establish that the Charter of Rights takes precedence over this or that nothing in here removes any rights that have just been received by anyone.

Mr. Patterson: I think that is what we are asking.

Mr. Coles: Yes, it is part of our statement.

Mr. Breaugh: One final point: You have introduced an interesting concept here on a couple of occasions this morning and one that I find attractive, basically saying that this is all fine, but if you, for example, resolve the differences between federal and provincial governments and aboriginal peoples, proceed, and if you do not, hold off for a bit. I find that an interesting concept.

There are those who might consider this to be tantamount to blackmail, which is probably why I find it very attractive, but it does kind of put out that there are a couple of things here that have to be resolved before you proceed with this. I just wondered how strictly you wanted that adhered to. Is that kind of a fervent plea that you cannot proceed with this? This committee, for example, has been told by the Premier that amendments would not be well received, and we may have to deal with that in a confrontational way later on,

but for now, we are very interested in looking at other ways in which we could solve some problems that people have with this that do not involve amendments.

One of the ways, frankly, would be to simply say in our report: "Listen, if you folks all want to get together and resolve the differences between aboriginal rights and the various provinces and the federal government, and you have a couple of years left to do it, if you want to resolve that one and get that put away prior to the accord being formalized, fine." There is considerable attraction there. Could you elaborate on that just a little bit?

Mr. Patterson: I think that is exactly what we intended, and your interpretation is exactly in the right light. What we are indicating here is not that we are opposed to a lot that is in the accord. Some of it, as you have indicated, simply requires clarification.

On something like aboriginal rights, we ourselves did not receive well the fact that the 11 first ministers seem to have concluded that the process with respect to aboriginal peoples and protection of their rights in the Constitution is over with, having held several conferences and reached no conclusion. We were happy to see that the joint committee of the House of Commons and the Senate had recommended that at least one further conference involving the issue of aboriginal rights be scheduled prior to the coming into force of the Meech Lake accord.

This at least went one step further than the 11 first ministers had been willing to go. They are suggesting even more than that, of course, but with that as well as our suggestion, maybe section 106A, which concerns us so much, could be held in reserve for a further two years awaiting an interpretative document that would put right our concerns. That might be a way to proceed without actually amending or defeating the accord on the part of the government of Ontario.

Mr. Cordiano: Thank you for your presentation. I just want to quickly cover the three points you have made in conclusion here. Starting with the first, section 106A and the spending provisions, I understand what you are saying. Basically you are agreeing that the federal government's spending powers have now been clarified in areas of exclusive provincial jurisdiction, that it is an extension of federal jurisdiction which was not constitutionally recognized prior to this accord. Do you agree with me on that? Is that what you are leading to? In a sense, we had exclusive provincial jurisdiction in those areas and now it has been recognized, as inherent in the Constitution and explicitly stated in section 106A, you have federal spending powers.

Mr. Patterson: Our concern is that that is not really an accomplishment of this accord, even though some people might think it is, because the spending powers in areas of exclusive provincial jurisdiction were confirmed by a Supreme Court of Canada decision and subsequently by the House of Lords, in 1936 and 1937. Section 36 of the Constitution Act also confirmed some of the federal spending powers in areas of exclusive provincial jurisdiction, and we do not think that was actually at issue.

In fact, there is some concern, although we have not expressed that, that the wording of the accord might limit future federal spending power in areas of exclusive provincial jurisdiction. Up to now, there were no limits on that federal spending power.

Mr. Cordiano: What, in effect, has taken place in practice is now being constitutionalized. We had a series of arrangements--in fact, we

literally had wars during the 1960s and 1970s with regard to federal and provincial relations and areas of exclusive provincial jurisdiction. There was a virtual war between the provincial and federal levels of government.

I think what is being attempted here is clarification. It may not satisfy your needs, but I am saying it at least attempts to recognize the fact constitutionally, because it is not recognized, as far as I can see. Referring back to what some of the body of legal opinion has indicated to us and referring to what Peter Hogg has said in his testimony and in the book he has written on the accord, he is simply suggesting that there was nowhere recognized prior to this that the federal government had any authority to spend in areas of exclusive provincial jurisdiction. This was not a fact. There may have been arrangements, but legally I think it was not recognized, as far as the body of legal opinion we have had presented to us says.

1030

Mr. Patterson: I think you are right that it had never been recognized by the provinces but it had been recognized nevertheless, because provinces had in the past challenged that right and lost their challenges.

Mr. Cordiano: I cannot refer to the specific cases because I think we will get into a series of long-winded debates on this. I am saying that we, as members of this committee trying to grapple with this question, had a body of opinion that suggested very clearly that, indeed, this is a new unprecedented move on the part of both levels of government to recognize something that simply was not there before. That is what has been indicated to us from the legal experts. In fact, even people who were opposed to the accord were granting that much.

They may not agree with the strength of the recognition because they are talking about national objectives not going far enough and establishing standards. That is something I put to you. Perhaps the word "standard" is something that would have been more acceptable to certain groups, but it is a question of what we mean and what is not clarified by objectives. Is that something you are also suggesting, that it is not very clear what objectives are?

Mr. Patterson: I think our concern may be that objectives are too clear. Then, when it comes to interpretation in the future of what the constitutional reform would amount to, the powers of the federal Parliament in some cases, once they were exercised, might be interpreted to be imposing standards or imposing conditions or criteria on the way social programs operated. Therefore, the power of the federal Parliament to designate what it would be spending money for would be quite limited.

Mr. Cordiano: I do not know if I follow what you are saying. The general view is that without having some notion of standards being established, the provinces may be able to get around the national objectives.

Mr. Patterson: That is what we are saying, yes.

Mr. Cordiano: OK. You are agreeing with some of the other groups we have heard so far.

Mr. Patterson: That is right.

Mr. Cordiano: And maybe most of them later on, but thus far it has only been some of them.

Certainly it will be debated what exactly national objectives mean and refer to, but I think you have to recognize that the national government spending in areas of exclusive provincial jurisdiction was an ongoing arrangement kind of thing that had to be worked out. There were deals back and forth as to how the federal government would spend in those areas that the government of Canada had to negotiate with each of the governments of the provinces on all those social programs. That is how these arrangements were worked out over the years between the federal and provincial levels of government. Nothing was very clear-cut.

Mr. Coles: I call Mr. Cordiano's attention to page 4 in our document, the paragraph second from the bottom of the page. It seems to me we are offering a suggestion there of another major contributor in the dialogue between the federal and the provincial powers, namely, the bodies of people who are at stake here.

Mr. Cordiano: Yes.

Mr. Coles: Their future should not be negotiated in their absence, but they ought to be drawn into the process of clarifying section 106A. It is not just a matter of interest between two levels of government. It is of great concern not only to the people in difficulty across our provinces but also to the agencies, such as the social planning council, that are trying to find a way of supplementing the power of those people to speak to their own future.

Mr. Cordiano: That leads to the next point about the ongoing process of constitutional reform. In fact, there is a provision in the accord for annual first ministers' conferences. This will be an ongoing discussion or debate and there will be more opportunity for groups, whatever sector of society they represent, to make their claims before these first ministers' conferences occur.

We are trying to grapple as a committee with the whole process and how we go about defining a process that will enhance that opportunity. I do not want to take any more time, Mr. Chairman--I know we are pressed for time--but that certainly is something we are considering.

Mr. Sterling: Yes, I would like to thank the witnesses as well for their very easily understood concerns. I think they have laid them out very well.

I have a lot of concern over section 106A as well. I was not pleased with the Constitution in 1982 which allowed, under the Loughheed formula, provinces to opt out in certain circumstances of our Constitution. The whole idea of a Constitution is to have a unified country, unified rights across the whole of our country. So I was upset with the Loughheed formula in terms of opting out. Section 106A not only allows provinces to opt out but also pays them to opt out, pays people to opt out of providing equal opportunity across our country. I find it extremely, extremely objectionable on that ground.

Then when I try to read section 36 of our Constitution which thrusts some responsibility on our federal government to provide people across our country with an equal access, an equality, to social services, I find section 106A almost the complete opposite of section 36 in the thrusts of those two sections.

My question to you is that in a political context, having been a member of this Legislature for 10 years and observing joint federal-provincial

programs both under the past administration of the Liberal government and under this government, there has always been a jealousy between a federal and a provincial government as to who is getting credit for social programming. That is part of the political game.

Do you think that section 106A will discourage this federal government and any future federal government from taking an active role in providing social programs for our people? What is in it for them? They offer a program and the province is paid to opt out, the province is compensated. Then they come in with the federal bucks and get the political glory for whatever alternative program they offered. I think this is extremely dangerous.

Mr. Patterson: I think that is a potentially legitimate fear.

Mr. Sterling: Yes. Do you think it will discourage future federal governments in our country from taking a leadership role in providing social services across the country?

Mr. Patterson: I think it easily could. It would certainly make it in many instances much more difficult to play that role. The example we cite several times is the discussion of standards within the Canada Health Act. If the present wording of section 106A had been in effect in the recent past, an act like that could not have been passed, although if it had been passed, it would have had very little force because the province could easily have opted out, claimed the cost-sharing funds and run its medicare programs as it saw fit with extra billing and all the rest of it, which, to this government's credit, it had opposed.

Mr. Sterling: Yes. That is all I have then.

Mr. Chairman: Just in closing, I have one question on the federal spending power. We are talking here about the federal spending power in areas of exclusive provincial jurisdiction. The only thing, and I say this as somebody who has spent some time working at the provincial level, is that it seems to me we are always in a bit of a problem where if there is not a particular program, we look to the federal government for leadership often in terms of that program. But in terms of delivery, and I do not think you are saying that the federal government should be delivering all social programs because I think that would be--

Mr. Patterson: We are not saying they should deliver them at all.

1040

Mr. Chairman: But I think there is in the balance there--I do not have an immediate fear that just because a province is going to help develop standards or objectives for a program, that is necessarily bad. I think there is a lot in the thrust of your recommendation in terms of clarifying and reviewing that makes a lot of sense in determining where we go, but I would want to be mindful that I do not think the federal government is necessarily always right in a lot of the different arguments or disputes we have had over the past 25 or 30 years on that.

Mr. Patterson: I do not think we are suggesting that.

Mr. Chairman: No, I just wanted to be clear on that.

Mr. Patterson: That is why we suggested in here that we approve, or

do not disapprove certainly, of the process of negotiation as it has occurred in the past. Our concern is that a province or even a small group of provinces could in effect completely undo what the majority of provinces had agreed to and use funds in some cases literally for any purpose they might see fit under the wording of section 106A.

Mr. Sterling: My concern now is in terms of accountability. If we give the federal government the major tax revenue sources through various means, I still believe it has to have some strings that it can attach to any kind of program it sends out. Otherwise, the ultimate thing is that it starts backing out of collecting taxes and our poorer provinces will not be able to cope with the same level of social programs as the richer provinces like we are today.

Mr. Coles: That is true. That is the theology of balkanization.

Mr. Sterling: I still believe strongly that the guy who pays the bucks, the federal government, has the right to put some reasonable strings on it. What section 106A says is that the federal government will not be able to put strings on any deals we make in the future, so why do the deal?

Mr. Chairman: This almost takes us back to the discussions in the 1960s and early 1970s over all the major programs. I think anyone who sat in either as an official or as an elected representative can remember many of these points coming forward. I suppose it is an essential element of Canadian federalism. Maybe we will always be doing it no matter what the amendments may or may not be.

I would like to thank you very much for joining us this morning, particularly for pinpointing the concerns around that section. It has certainly been raised before, but by focusing our attention on it and some of the suggestions that you have made, it has been most helpful. There are other social service and social planning organizations that are going to be making a presentation before us, and I suspect in many instances they may be dealing with the same concern. We very much appreciate the brief and the focus and thank you for joining us this morning.

I now call upon Gayle Barnett, our next witness. Everyone should have a copy of Ms. Barnett's presentation. I will simply turn the microphone over to you. If you would like to introduce yourself briefly, then please proceed and express your views and concerns.

GAYLE BARNETT

Ms. Barnett: I am here primarily today thanks to Professor Peter Russell from the University of Toronto who addressed a graduate political science course that I am taking at York University in January of this year. We have a profound and fundamental disagreement on the accord that might redefine the term "understatement." However, I would like to acknowledge with thanks his term "document of accommodation," which you will find extensively used in this presentation.

I am also here as a private citizen, not as a student, so take that into consideration when you ask me your questions.

Mr. Chairman: We are all students.

Ms. Barnett: Yes.

I have read the Meech Lake accord and the Charter of Rights and Freedoms. As a committee and as decision-makers, I know that you have read the Canadian Charter of Rights and Freedoms. However, I would like to know, did you then compare Meech Lake to that document of guarantees? Were you impressed with the dimension, the scope and the depth of Meech Lake or does it leave you a little uncomfortable and a little queasy? Do you see Meech Lake as a document that will enhance us as a nation, that will encourage us as citizens, that will develop a climate of tolerance and acceptance, that will instill a sense of pride in our ability to solve our problems and live in peace and harmony?

I personally have strong reservations, although I do agree with the Prime Minister and the premiers of virtually every province in this country when they say the accord is not perfect. Not only is it not perfect, the people who signed it have yet to agree on the meaning of some of the terms they insist they agree on. One such example is the "distinct society" clause.

Let us for argument's sake define the Meech Lake accord as a document of accommodation and let us assume that the thrust of Meech Lake is to accommodate Quebec, to have les Québécois as signatories to our Constitution Act 1982. Let it be accepted that we are following in the tradition that began with the Quebec Act, followed by the various acts of union and the British North America Act through to the Meech Lake accord.

How does Meech Lake compare to the other documents of accommodation? If the only concern was to have Quebec sign the Constitution at no cost to, or for the mutual benefit of, the rest of the country, there would be little or no problem. In reality, there are prohibitive costs. Why? In 1981, nine premiers and the then Prime Minister ganged up on Lévesque and put together a deal they could live with without the consent of Quebec.

The same thing is happening again. We will need an amendment at some point, because the Supreme Court will have to decide on the definition of "distinct society," mainly because there is no definition now and no two premiers agree on what is meant by the term. When the Supreme Court defines the term, there will be a perceived big winner and an absolute loser that will make 1981 seem like a mere skirmish.

The battle lines have already been drawn. M. Bourassa put the newly signed accord under his arm, immediately trotted into the National Assembly and said, "This is what we have." He then established for the record and for the Québécois the meaning of the definition of the accord for the province of Quebec. At no time did M. Bourassa state or imply that he had gotten a symbolic acceptance of Quebec as a distinct society.

Does the province of Ontario accept and acknowledge the definition of "distinct society" delivered by M. Bourassa in the National Assembly and ratified by that august body? If we do, then let us say so. If we do not, let us define exactly what we mean when we ratify Quebec as a distinct society. To do otherwise is to guarantee that this issue of Quebec accommodation will have to be addressed yet again.

Sections 16 through 22 of the charter offer far more protection than the ambiguous, undefined, open-to-interpretation-and-abuse language in Meech Lake. To try to argue that Meech Lake is a document of accommodation is ridiculous when the people who agreed to it and are willing to ratify it disagree on the meaning of one of the key terms they insist they agree on. This is the kind of intellectual elasticity that has produced an accord that is a poorly worded apology instead of a constructive solution.

My recommendation for this committee to consider is that you define the term "distinct society."

Immigration: Subsection 6(2) of the charter guarantees mobility rights for every citizen and every person who has status as a permanent resident. They have the right to move to and take up residence in any province in Canada.

Section 15 guarantees that every individual is equal before and under the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27 allows for the preservation and enhancement of the multicultural heritage of Canadians.

With the above sentiments so eloquently expressed, I am sure you can appreciate that I am very concerned that the first amendment to our Constitution will severely undermine the guarantees we have yet to become accustomed to.

Quebec is guaranteed a proportionate share of the immigrant population, with an option for an additional five per cent. How long do immigrants have to remain in the receiving province? In other words, at what point do the mobility rights guaranteed in subsection 6(2b) of the charter apply? Will the immigrants have a choice in language selection? Will they be able to select which official language will best serve their interests? When they acquire the status of permanent resident, will they then be able exercise their choice in official language?

I can appreciate Québécois desires to protect and enhance their language and culture, but not if it means that the people who are assigned to that province on the quota package negotiated at Meech Lake denies that particular immigrant population the same rights guaranteed to all other immigrant groups in all other parts of the country.

1050

As you can see, immigration and distinct society are interrelated. Quebec has not been able to attract immigrants to its shores because it is a disadvantage not being able to participate in the dominant language and culture of North America. I do not know that Canada can address the concerns of Quebec on the backs of a few immigrants. I do not even know that we should. If Quebec wants immigrants, it should offer opportunities that are competitive with those in the rest of Canada, not seek quota guarantees.

It is not enough that Quebec women support Meech Lake or that Quebec men support Meech Lake, or even that Quebec politicians support Meech Lake. It is not what Meech Lake does so much as what it does not do. It does not build a nation because it is so parochial. It does address the destructive tendencies of regionalism; it enhances them. It does not bring new people to this country as equals, but punishes some and rewards others based on where they happen to be allocated by a quota system. Is it really what the Québécois support? Must all Canadians do so and, if so, to what end?

Our recommendation for the committee to consider is that the Meech Lake accord be amended to reflect and enhance the Canadian Charter of Rights and Freedoms, especially in the areas of mobility rights, equality and the promotion of Canada as a multicultural and pluralistic society.

Equality: In 1981, section 28 of the charter was successfully negotiated because of the legitimate concerns of women. It was a long and arduous battle but apparently not of any great importance to those men who were concerned with the hard work of real nation-building. Today we have 10 premiers and the Prime Minister saying they cannot accommodate the concerns of women across this country without undermining their agreement. Tough. Who is the agreement for: the politicians and their egos or the people they represent?

At the risk of offending you, and that is not my intention any more than it is the intention of our politicians to offend us, I will offer you an analogy that best sums up the insulting treatment women are subjected to with respect to their concerns.

During the last federal election, the then Prime Minister, John Turner, was roundly criticized for patting the backside of a female campaign worker. You may recall his statement at the time was that he was a "tactile person." I thought he should have tactiled himself and still do.

Interjection.

Ms. Barnett: Not quite enough.

However, it seems nothing was learned by that outrage. The dismissal of women's concerns by the men who negotiated this insidious piece of constitutional legislation is very similar to a pat on the bum by those who are on their way out the door to deal with more important matters. I believe it is time to come back into the room, sit down and start to seriously accommodate with both hands on the table.

The persistent denial of women as part of the contract of citizenship is infuriating. Yet when we look at the treatment of the first-nation people, we realize that they have the dubious honour of receiving the proverbial kick in the groin. They too have been dismissed. They have been denied recognition as full status human beings with the same rights and freedoms guaranteed to you individually and collectively. Is it any wonder women get angry when we see how they are treated? It is not difficult for us to look at them and see where we were 50 years ago.

Just a few short weeks before the accord, there was a conference to address the concerns of the indigenous Canadians. It was adjourned with no agreement. There was nothing more to be said. It was time to get on with more important matters like accommodating Quebec with a document like the accord.

Enough is enough. They are not children who need our protection unless it is protection from us. They are not savages who need civilizing before they can be given responsibility for their own lives. They should be able to decide for themselves what is civilized and what is patronizing genocide. They are no different from any of us, except for our treatment of them for economic reasons--ours not theirs. Self-determination will allow them to be equal to every other citizen in every other province. A document of accommodation should be able to reflect that with little or no difficulty. We are past masters at negotiating deals when it is economically beneficial to us. Perhaps now is the time to do so because it is morally and socially beneficial.

The attitude of Premier Peterson is somewhat upsetting. His platitudes to the first-nation people demean not only his office but, by association, they demean me. I voted Liberal; therefore, I bear some responsibility for these omissions. I am here to say I find them totally unacceptable. I want to

know how our Premier could negotiate a Canadian document of accommodation and leave out the Indian, the Inuit and the Dene. To say it was the best he could do is not enough.

We were all raised with the adage, "If you can't say something nice, don't say anything at all." It should also include: "If you can't do something good, don't do anything at all. Don't do something you know is wrong just so you can say you did something." Sometimes doing nothing gives one time to do something right.

Until we have the maturity to recognize that every individual and group is the fabric that weaves us into a distinct society, we are not ready for the responsibility of nation-building.

Until we accept that gender and race and ethnicity and citizenship are absolutes that cannot be ignored or disposed of at the whim of a few because they are too hard or too mundane to deal with, we are not ready for the awesome responsibility of accommodation.

Until we have the vision for nation-building from coast to coast, from person to person, and for person to person, let us muddle through with the Canadian Charter of Rights and Freedoms and our as yet unamended Constitution, instead of trying to justify a piece of paper like the Meech Lake accord.

There are two recommendations there which I will leave to the committee to read.

Under the amending formula, which is mind-boggling, I believe it is self-evidently absurd in a free and democratic society that unanimity is essential for constitutional amendment. The double majority that currently exists in the Constitution best reflects the democratic principles we live by. I would strongly ask this committee consider that the amending formula be deleted from the Meech Lake accord.

In conclusion, I know we have heard for almost a year now that while this accord is not perfect, it makes Quebec happy and it allows us to be a real nation. Surely even the politicians who signed this document do not believe that to be true. They individually do not know what the other 10 signees mean, at least not in the written form. In order to have a consensus, is it not customary to at least have agreement on terminology? Les Québécois are saying to the rest of Canada that they want the accord even though their Premier himself has acknowledged there are some concerns that will have to be addressed in future amendments. It is absurd.

Unless and until there is a definition of "distinct society" for Quebec and for Canada, there is no agreement; therefore, there is no accommodation and so there is still no solution. Unless and until Quebec accepts that the dominant language and culture of North America is not francophonie, they will continue to have difficulty attracting willing immigrants who will want to remain in the province. We, as a nation, cannot accommodate Quebec on the backs of a few immigrants, so there is still no solution. Unless and until there is an automatic acknowledgement that women, visible minorities, indigenous Canadians and all the multi-isms in all parts of this country are equal, there is no accommodation and there is still no solution.

The Meech Lake accord is not a document of accommodation, especially for Quebec. It could be called a document of divisiveness or a document of discrimination, even a document that denigrates the Canadian Charter of Rights and Freedoms, but most assuredly, it is not a document of accommodation.

Meech Lake seems to accommodate ineptitude and cynicism, maybe even pride. Egos are wrapped up in this agreement, political reputations are on the line. I can sympathize to a certain extent, but these amendments are for the future. They will affect the lives of our children and their children, and their children. We are making a statement about our country and the people who live in it. Are we setting the example that we want to see future generations emulate in the area of political accommodation?

Finally, in absolute conclusion, I would hope that this whole process of public hearings on Meech Lake is not one more example of the cynicism that permeates the whole accord. I would hope that there is some merit in coming to share my concerns and that this is not just an exercise that will allow new members to acquire some committee experience. If amendments will not be tolerated by the Premier, what other conclusions can one come to?

I thank you for your time and I hope you will give the recommendations that I have submitted some consideration during your deliberations.

1100

Mr. Chairman: Thank you very much for your forceful presentation. We will move into questions. Mr. Breaugh.

Mr. Breaugh: I want to say, for starters, this is kind of unusual. We do not usually have a private citizen appear before a committee such as this on this kind of document who has actually done some research and thought about the issues and read some of the documentation. It is not difficult to find somebody who has an opinion on the matter, but to find someone who has thought it through and has done a little research on it is unusual.

I really have just one question for you. We have a political problem. Although it is an attractive notion to move amendments, as an opposition member I could score all kinds of brownie points by saying, "I really like your proposals and I am going to move those amendments," the political reality is that they would not carry in this committee, and even if I really got hot some day and got one of them through here, they would not carry upstairs in the chamber, and even if we were tremendously successful and we got it through this chamber, it would have to go through 11 other chambers with probably 1,000 or so politicians in Canada, across the country, with about eight million opportunities not to call the motion, to talk it out for the afternoon, never to bring it to a vote. This could go on for about four centuries before the amendment I proposed in this room actually got ratified across Canada.

The Premier and the Prime Minister have really put us in a nifty situation where you cannot win. So what we are looking for is any other way to go about seeking the changes we want without moving amendments, which is the traditional way we would do it. I think we all have to admit that this process stinks, it is completely ass-backwards, it is wrong from day one but the process has happened, so it is our job to see what we can do to rectify it.

One of the things a number of groups have suggested to us and that I am coming to the conclusion would be useful would be to put a reference to the Supreme Court to resolve the question as to whether or not the Charter of Rights is overridden by this accord or not. We have seen a difference of opinion among the experts as to whether that is true, whether an amendment such as the one you suggest would be relevant, workable, acceptable.

If we were able to find a number of alternatives, a reference to the court, an indication not to proceed with certain parts of the agreement until other things were done, the resolution of aboriginal rights, would that solve some of your concerns around the Meech Lake accord?

Ms. Barnett: I am not quite sure what the question is.

Mr. Breaugh: Let me put it blunter terms then. Do you hate this damned thing so much that we should throw it out the window or should we try to find some way to clarify what is in the accord, resolve the anxieties that a lot of people have about whether something they just gained in the Charter of Rights a few years ago has now been taken out of the thing, and we probably could resolve that, should the Supreme Court co-operate? Is it our job just to say no to this on these grounds or is it our job to try to deal with the various problems that people have legitimately brought before us and see whether we can answer those problems?

Ms. Barnett: Absolutely, it is the latter. Define for me "distinct society." Define for me my rights as a woman. Are they lost under section 28? Does section 28 still apply? The group that was here before, the social planning council, has some very real concerns because there is not a defined term. What the politicians agreed to behind closed doors is not reflected in the document in writing. Does it apply to all of Canada? If this is a Canadian document, does it apply to all Canadians?

Mr. Offer: I would like to echo the words of Mr. Breaugh with respect to thanking you for coming forward with respect to this presentation as a private citizen who has done some research. I can assure you, and I guess I speak for all the members of the committee, we too have done our reading.

Ms. Barnett: I am sure you have.

Mr. Offer: We do appreciate very much this type of presentation.

My first question deals with your fifth recommendation, and it is just really a matter of clarification. You asked that the amending formula be deleted from the Meech Lake accord. What should it be replaced with?

Ms. Barnett: The one that is currently in the Constitution, the double majority.

Mr. Offer: I just wanted that as a matter of clarification.

On that particular point, one of the reasons the unanimity formula was inserted was that dealing with national institutions which affect all the provinces, dealing with matters which equally affect all provinces--understanding, of course, that not all provinces have the same population, but we are dealing with something of a very fundamental nature--all provinces should of their own right have to agree with respect to any change in those particular fundamental institutions.

I would like to get a sense from you as to why we should not give that right to all provinces with respect to those fundamental institutions in this country.

Ms. Barnett: I guess I can only answer that on a fundamental basis. You have never had a referendum in Canada on fundamental issues, and you would not seek to have the consensus of Canadians. You do it within the political

arenas. And you would never in your wildest dreams expect all Canadians to agree on anything. We live in a democracy. I can appreciate that we would like all provinces to participate and have a say, but we cannot allow one province to say no to 10 or more, if there were other provinces in the Northwest Territories, to what virtually is consensus; if nine, eight or seven provinces agree, you have consensus in the country, which you do not have now even with Meech Lake.

Mr. Offer: I understand what you are saying. Obviously, I personally have difficulty in agreeing with that, because what we are talking about in the unanimity section are areas that, to my way of thinking, in my personal opinion, are just the very essence of national institutions. It is just my feeling, and obviously I see that you disagree, that these are areas where all provinces really should be able to agree, or must agree, before any change is made.

Ms. Barnett: May I give just one example?

Mr. Offer: Sure.

Ms. Barnett: Apparently 10 provinces and the Prime Minister of this country saw fit, under the equality sections of Meech Lake, to exclude women's concerns; they are continuing to do so. How does that enhance us as a nation and our national institutions? I do not see that it goes anywhere. We are on a circular motion here. We either live in a democracy or we do not. Unanimity is going to defeat the national institutions. If nine provinces say yes and one says no, I do not see that it is going to enhance our relationships.

Mr. Offer: You bring up an interesting point. If I might just carry on with the point you brought forward--I imagine you are talking about section 28 and its not being included in section 16--we have heard from other deputations. I believe Professor Hogg indicated that section 28 is not exclusively an interpretative type of section but in fact could be argued as a rights-giving type of section and as such it is not necessary to include section 16, which really does incorporate just interpretative sections and puts them on a par with the distinct society. That is just in response to your concern.

The last question I have is with respect to your recommendation 4. You talk about the accord including a statement with respect to self-determination as a matter of right for the first nation people. The question I have is, with respect to the constitutionalization of first ministers' conferences dealing with constitutional matters on a yearly basis, could it not be said that the opportunity exists, maybe more than ever before, that matters such as this, matters such as concerns of the Northwest Territories, the Yukon and other persons, would be addressed on a timely, yearly basis or at least would have the possibility of being addressed?

Without talking about the particulars of recommendation 4, and just discussing the fact that right now we are dealing with an agreement that for the first time says we are going to make certain that we deal with issues of this magnitude on a yearly basis, I am wondering whether that gives a sense of optimism, a sense of looking forward, a sense of continually evolving this Constitution to identify and address needs and to make certain that we meet those needs.

Ms. Barnett: I believe you have already received a delegation from the Northwest Territories.

Mr. Offer: Yesterday we heard from the Northwest Territories and the Yukon.

Ms. Barnett: Were they all excited about the exclusion? I believe they are asking for self-determination as a matter of right.

Mr. Offer: Not necessarily. They certainly had concerns--

Ms. Barnett: They are certainly not jumping for joy on Meech Lake.

Mr. Offer: They were very much concerned with the process. But with respect to the question of self-determination for first nation people, my point is that we now have in this document the constitutionalization of a first ministers' conference yearly to deal with the matters of this type of importance. I believe personally that in many ways we have now set up the forum for these matters to be heard on a year-by-year basis.

Certainly we have heard concerns with respect to how that process is to take place. We are going to have to grapple with that, and we have been grappling with that since day one; but the fact is that now it is in that Constitution and the forum is there. I would like to get a sense from you as to whether possibly this particular concern has at least the opportunity of being met and realized through that section in the accord.

Ms. Barnett: I put that recommendation there so that it would be a part of the process, so that it would in fact be put on the agenda. There is nowhere in Meech Lake that says that indigenous Canadians will in fact be put on the agenda, that women will in fact be put on the agenda--we can go on. Put it on the agenda and kick it into the process.

Mr. Eves: I just have one brief question. I would agree somewhat, I suppose, with Mr. Breaugh about political reality. I would say to you at the outset, although I may sympathize with some of the points that you have made, I think it is asking a little much to ask this committee to define "distinct society." I think that is something that the courts will decide over a period of time in individual cases.

However, I do have a great deal of sympathy with respect to the point you made with respect to section 28 of the charter. We have had numerous delegations appear before us already, and we are not even anywhere near halfway through the number of people whom we are going to be hearing from.

We have had Professor Baines, for example, from Queen's University in the very first week that this committee sat, who was also concerned about protection of women's rights and, of course, the obvious omission of same in section 16 of the Meech Lake accord which, as I am sure you are aware, only protects multicultural heritage and aboriginal rights.

One suggestion that both Professor Baines and other groups have made is that perhaps not only should the rights under section 28 be protected but all rights under the Charter of Rights and Freedoms should be protected. Would you be in favour of such a simple amendment?

Ms. Barnett: Obviously. My concern is that since section 28 was excluded--clause 16 of the accord specifically deals with multiculturalism and

aboriginal rights, sections 25 and 27 of the charter--obviously section 28 is not included, because otherwise it would have been mentioned. That is my concern, that because it was excluded it is not in fact included.

Miss Roberts: If it is not included, maybe it is because it already is supreme and has supremacy over what is included in section 16 anyway.

Ms. Barnett: Again, we are defining our terms.

Miss Roberts: That is right. But that is the legal argument, and there has not been any particular answer to that. You used your words very well; it is apparently that, not necessarily that.

Ms. Barnett: That is right.

Miss Roberts: I hope we all agree that it is not necessarily that and that indeed section 28 is supreme.

Ms. Barnett: It had better be.

Miss Roberts: I think we have to go on that basis.

Ms. Barnett: I want it.

Miss Roberts: And there is no reason to believe it is not.

Mr. Chairman: I want to thank you very much.

Ms. Barnett: Thank you.

Mr. Chairman: As other speakers have said, we do appreciate--you, in fact, are the first private citizen we have heard. That is a term that at some point we are all going to have to define.

Ms. Barnett: Does that mean I am a Canadian?

Mr. Chairman: They come forward in so many different capacities, and here we have a living, breathing private citizen.

Ms. Barnett: A real person.

Mr. Chairman: We thank you very much. As I am sure you are aware and as other members have said, a number of the points that you have raised certainly have been raised by other organizations and indeed will be raised as we go through our hearings, but we are grateful for your taking the time and coming before us today.

Ms. Barnett: Thank you for your time.

Mr. Chairman: I would now like to call the representatives of the National Congress of Italian Canadians, if they could come forward to the table: Angelo Delfino, first vice-president at the national level; Gregory Grande, president of the Toronto district; Manlio D'Ambrosio, president of the Ontario region, and Ms. Annamarie Castrilli, member of the Italian Canadian Women's Alliance.

We are in your hands as to how to proceed and whomever you would like to designate as the first spokesperson, please do so. We are running a bit

behind, but we do want to make sure that we give you adequate time to make your presentation. If we could think in terms of approximately the half hour or so that we were trying to deal with, that might help in the proceedings. Whoever would like to go first, please do so.

NATIONAL CONGRESS OF ITALIAN CANADIANS

Ms. Castrilli: I would like to begin by talking very briefly about the National Congress of Italian Canadians, specifically the Toronto and Ontario region, which we represent.

I am the only member of the delegation who is not a member of the executive of one of the levels of the congress. The Toronto and Ontario components of the National Congress of Italian Canadians--you will see there is a chart in your brief showing roughly how the organization is set up--represent roughly 600,000 Canadians in Ontario. The organizations have traditionally worked independently and together to lobby and represent the interest of the those Canadians, and their latest collaboration is this particular brief.

Before discussing some of the issues that are addressed in the brief, I feel it is important to state that this brief represents a result of a very difficult journey into the discovery of what it is to be a Canadian today in Ontario, a Canadian who is non-French, non-English and, if this document has anything to say about it, regardless of what has been said previously, nonmale.

I think the journey for us has been oftentimes pessimistic. I think our conclusions about individual rights, as they are protected in this accord, have been pessimistic. How these rights have been acknowledged and safeguarded have been, for us, pessimistic conclusions.

The realization that the concerns of those who have spoken in favour of equal rights could have been so easily dismissed in the past--as we have seen in the federal hearings--is also a source of great sadness. We are nevertheless confident, which is why we are here, that Ontario will set a new standard and will follow the Premier's direction, as he has stated, that changes to the 1987 constitutional accord will be possible if we can demonstrate that substantive rights of individuals are affected. I think we are going to take him at his word, and we propose to show how that, in our view, has occurred. We are therefore confident that the concerns of this delegation will be heard and carefully considered by your committee.

1120

Another issue that I think we should discuss before we launch into some of the recommendations is the whole position of the congress vis-à-vis Quebec. I think it is trite to say, as has been said to you before and likely will be repeated to you again, that this is not an anti-Quebec stand. In fact, I think you will notice from the fundamental premise, which is stated at the beginning of the brief, that our response to the 1987 constitutional accord is that Canada is a land whose inhabitants feel that the dream of equality is within their grasp, largely made up of immigrants who have come here with specific goals of achieving better opportunities for themselves and for their children, and that means similar opportunities and similar access to services and similar rights.

Je voudrais répéter cela en français, car ce principe est extrêmement important. Le principe fondamental de cette réponse à l'accord est que le

Canada est un pays où l'on rêve toujours d'avoir l'égalité à portée de nos citoyens, bien qu'ils soient de différentes cultures, de différents âges ou de différentes religions et possèdent différents talents. Dans ce contexte, les hommes et les femmes s'efforcent de vivre et de travailler ensemble dans un pays où ils ont des chances égales, le même accès aux services et des bénéfices égaux.

It cannot be said too often that the recognition of full participation of Quebec in this mosaic is of critical importance. La reconnaissance et la pleine participation de la province de Québec dans cette mosaïque est d'une importance clé.

The position taken by the congress, therefore, is to be construed as one which is fully cognizant of the concerns of Quebec and of the need to make some changes to the Constitution Act of 1982 to gain Quebec's assent. While the Constitution Act of 1982 may have been binding on Quebec, it is surely not acceptable that any province should be bound against the will of its people.

With that in mind, I will turn to some of the issues. You will appreciate we cannot go through the entire brief with you, but our first concern involves the process by which this accord was arrived at. Our view is that if the Constitution is to mean anything at all, it is to develop a framework within which Canadians can live by seeking input into that framework. What has happened to date is that Canadians have not been consulted, and we would hope that will not be something which will set a precedent for time to come.

Our first objection to the accord, if you like, is to be found with section 1 of the accord which sets out a description of Canada which we feel does not reflect the Canada that we acknowledge exists. Section 1 of the accord totally ignores that in Canada since 1971 we have had a policy of official bilingualism which has worked in tandem with multiculturalism. You will note that in our brief we document that quite extensively and you might want to refer to that at some point.

Section 1 is at least arguably open to the interpretation that the recognition of multiculturalism and of the fundamental characteristics of minority cultures and of the native population in Canada is denied. This interpretation is borne out by the fact that the section states that the role of Parliament and the Legislature is only to preserve the fundamental French-English characteristic and the distinct identity of Quebec. The multicultural character of Canada, which we submit constitutes the majority of us, is thus ignored. That can lead, in turn, to the perception that after the accord, some Canadians will be more equal than others. If ratified in its present form, it is our contention that the document will make second-class citizens of all those who are not members of the two founding races.

The accord, in fairness, has attempted to address multiculturalism through the drafting of section 16. I will not repeat that to you. I am sure you know it by now verbatim. That section specifically says that section 27 of the Canadian Charter of Rights and Freedoms is not affected. Section 27 states that: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." That section, however, is not a guarantee of multicultural rights. It is only a rule of interpretation and it pertains only to the charter and not to the Constitution as a whole. We will touch on the significance of that in a moment.

The combined effect of these legislative provisions, from our point of

view, is that while the Constitution as a whole must be interpreted in a manner consistent with bilingualism, only the charter is to be interpreted in a manner consistent with multiculturalism, thus our contention that multiculturalism will attain second-class status in this country.

If you look at the decision of the Supreme Court of Canada in the reference on Bill 30 which was handed down by the Supreme Court on June 25, 1987, you will see that the justices stated quite clearly that there are certain constitutional rights which are immune from charter review.

Since section 16 of the accord refers only to those rights which are in section 27 of the charter and since section 27 is only a rule of interpretation for the purposes of the charter, it follows that, in view of the Supreme Court decision, the recognition of multiculturalism is weakened. This will lead to the reality that multiculturalism may, in fact, if a case gets to court, be ignored in specific circumstances. Where there is a conflict between the accord and the charter on the one side and the Constitution on the other with regard to multicultural rights, the recognition given in the charter and continued in the court could therefore be overridden.

In fairness to the premiers and the Prime Minister, when they signed the accord, they did not have the benefit of the Supreme Court decision of June 3, and it would not be untoward to suggest that the accord should, at the very least, be examined in the light of that decision and its impact on multicultural rights.

We therefore suggest, as a first recommendation, that the accord be amended to include something to the effect that the multicultural characteristic of Canada is also a fundamental characteristic. There has been some discussion as to whether what really should be done is to add a preamble to the Constitution setting out the various components of Canada. For our purposes, we are dealing with the accord, and if it is the accord we are dealing with, we suggest that is something that has to be addressed.

For us, section 1 of the accord also poses some problems with regard to equality. I think if you read section 1 and section 16 together, it will become immediately apparent. Section 16 of the accord specifically ignores the equality sections set out in section 15 and 28 of the charter. We will not get into a lengthy recitation of those.

The exclusion of those sections from section 16 of the accord leaves the impression that priorities are being set, that the equality rights professed in those sections, regardless of the comments that have been made to the previous speaker, will be secondary to section 1 of the accord. As a matter of statutory interpretation, since section 16 of the accord specifically identifies only two charter provisions and two constitutional provisions, other provisions of the charter and of the constitutions may be ruled not to apply to section 1.

1130

If, however, sections 15 and 18 have been excluded because they are self-evident or, as has been said here, because they are predominant, and if they are self-evident truths which cannot be threatened by section 1, then we do not see what harm there is in clearly stating that in the accord for all to see. This can be rectified very simply by changing section 16 of the accord to state that nothing in the accord affects sections 15 and 28 of the Canadian Charter of Rights and Freedoms.

It has been asked here before whether the whole charter should be included under section 16. I think, in practical political terms, that may not be acceptable to Quebec, but I will leave that for others to judge. From our point of view, the equality of Canadians cannot be jeopardized by ambiguous language. We have got to be crystal-clear, and if we are so sure, then I think we should say so.

We have been assured that it is not intended that sections 15 and 28 are not to apply. The fact is that during the discussions which led up to the 1982 constitutional accord, we were given assurances that the abortion laws would not be jeopardized by the charter. Now, regardless of what your feelings may be about abortion--this is not a moral issue but simply a legal argument, and it could be just as equally applied to any other issue, car theft, if you like--the fact is that the Morgentaler decision expressly used the charter to overrule the abortion laws. That can happen again with regard to other substantive rights. You cannot take the words of politicians as they are discussing and deliberating to be conclusive on the evidence when the issue comes before the Supreme Court of Canada. I think it is naïve to think that Hansard will be considered at every turn.

As has been mentioned I am sure by speaker after speaker, we also have concerns about what "distinct society" means. It is clear that as of 1867, Quebec has been given specific rights. It is a province in its own right; it has its own common law system; it has its own system in education; it has since then opted out of the pension plan and so forth. If that is what "distinct society" means, we do not have any objection to stating it and we will be happy, but I think there has been too much discussion on what the phrase means to different people. It is clear there is no consensus.

I think at this point in time it is incumbent on this committee to make a recommendation. I realize the committee itself cannot define what "distinct society" is, but it is incumbent to make some sort of recommendation to the effect that "distinct society" ought to be very clearly set out. In the material before you in the past, it has been pointed out that Quebec's view of "distinct society," even from minister to minister and political party to political party, is quite different from what we may think "distinct society" is. We therefore recommend that that particular clause be clarified for all concerned.

Dealing with some of the other aspects, as you will see from our conclusion, if it is impossible to have a wholesale series of amendments to change what we think is fundamentally wrong with the accord, then clearly our objections to section 1 are the ones that should prevail and to which this committee should address itself.

With regard to immigration, we certainly have some concerns about section 3 of the accord and what that will do when the provinces and the federal government come to negotiating agreements on immigration. You will see from our text that worries involve fragmentation of services and delivery of services, different policies being set by the different provinces. We are certainly concerned about the ambiguity of the language which does not resolve a great many issues, for instance, who is going to set the yearly totals? Will the federal government still have a role in monitoring services for adequacy and to ensure equality across the country?

Those are issues we are trying to address here. In fairness, those are policy issues, and I can understand the argument that might be made on the other side. I think we would be quite content to leave it at that if there

were some assurance in the accord that the agreements that are entered into by the federal government and the provinces were not going to be done in camera and bartered without some public input. I think that is the concern here. We say that because the accord is very clear on point that any agreement between the Premier of a particular province and the Prime Minister has the force of law. It can be done by a series of exchanges of confidential information and suddenly, there we are, it is brought to life. So we are concerned about that.

We are concerned that those immigration agreements may be used as specific tools by specific provinces to weaken the multicultural character of this country. It would be very simple to say, "We are just not going to accept a particular group." If the concerns appear paranoid, they are not; they are simply questions that we have about the process. There should be something in the agreement to say that whatever negotiations are held with respect to negotiations will allow the opportunity of public input. It is clear that not every meeting between the Prime Minister and the premiers must be done under the glare of television cameras. That is not what is being suggested here. But certainly there must be some input from the people who are directly concerned or from private citizens who also have an interest.

With regard to shared-cost programs in areas of provincial jurisdiction, I think much has been made of the fact that some of these shared-cost programs in fact forge our national identity, that they may be what make us Canadians. I will leave that to the authorities to discuss.

The point here is that we are not insensitive to Quebec's position on this issue and to the fact that programs ought to be sensitive to regional differences. That is not the issue. Again here, as in immigration, we are concerned about a potential for fragmentation of services where you have provinces which opt out, which do not have to follow any federal "standards" but only "objectives." Much has been made of the definitions of those two words. I refer you to our paper, as well, for additional guidance on that point.

In particular, when one looks at the French text of the accord, when one looks at the word "compatible" in French, the meaning is quite different. Again, I refer you to our paper in that regard. It is clear that you just have to have programs that are capable of existing together in some fashion. That is quite a far cry from what we have now.

We wonder what will happen, for instance, in the next medicare crisis when extra billing is again an issue. Will provinces be able to say: "But look, we are spending the money on health care. What does it matter if doctors extra bill? There is no federal standard in force. We feel that we are complying with national objectives, because our program is capable of existing together with yours." Those are questions that I think have to be addressed.

We are worried that programs will become substandard, that we may indeed have no more national programs. If day care is still a priority in this country, then clearly under the present accord, it will be very difficult to achieve. We are mindful of the difficulties, and our recommendation would be that we change the words "national objectives," as I am sure you have heard before, to "national standards."

I think the language of section 7 ought to be expanded to include some sort of definition of federal criteria and of the role of the federal government to implement programs. As you can gather from our presentation, we feel there has to be a balance between the federal government establishing

national priorities and the regional governments establishing regional priorities. There has to be some sort of accommodation between those two.

1140

With regard to Senate and Supreme Court of Canada reform, dealing first with the Senate, which in some sense is easier and in some sense is more difficult, our first point is that, as presently set out, the accord will make reform of the Senate very difficult. I will deal with that when we get into the constitutional amendment section. But I guess we would say that with respect to the Senate, if we are really serious about reflecting Canada, then we ought to have some means of appointing senators as the present system calls for.

This is not by any means an endorsement of an appointed Senate. But dealing with the reality, I think an appointed Senate, as we have now, certainly should reflect the fact that we have at least 33 per cent of this country that is of non-French, non-English background and growing all the time and that 50 per cent of the population and more is female. The current statistics for the Senate do not bear that out in any way, and there is some documentation to that effect in our brief.

With regard to the Supreme Court of Canada, I think some of the same comments are true. The fact that there is no representation of any consequence from the female half of the population--we have two, of course--and the fact that there is no representation from the other cultures, if you like, presents some difficulty. The history of the Supreme Court of Canada with regard to minority rights and to women's rights has been less than laudable, shall we say. In our brief, we cite some of the cases and some of the results.

The reality is that you must have justices who not only have a knowledge of the law but can take judicial notice of Canada as it presently exists. To say to Mrs. Bliss that she was not discriminated against because a man, if he had been pregnant, would have been treated in exactly the same fashion, is a little silly. Yet we have decisions on the books to that effect.

Those are issues which will have to be addressed with regard to Supreme Court reform. We do not see that the accord addresses those issues. The accord only deals with lists which are to be presented by the provinces with no guidelines being set as to what kind of makeup there should be in the court.

On the issue of constitutional amendments, much has been made of the fact that there are restrictions in the accord; in fact, we have three formulas for amendments in our Constitution. The accord only presents one of them. The difficulty that we have is that the issues to which the accord addresses itself in terms of constitutional amendments are fundamental. There is no question. You would not want to change the Constitution lightly, and that is not what is being advocated. I do not think anyone who is responsible and interested in the subject has said that.

The fact is, however--and it has been noted elsewhere, particularly in the report of the federal committee on Meech Lake--that provincial-federal unanimity in this country has rarely been achieved. To suggest that now with the accord we are suddenly going to enter into a new era, I suspect is a little naïve.

As I have said, no one is suggesting that the Constitution be lightly changed, but on the other hand I think we have to devise a realistic formula

for members and one which will not take Canada and encapsulate it in 1987 with regards to certain basic issues and say, "This is it." I think there has to be at the very least, as we suggest in our brief, some mechanism for breaking stalemates when and if they occur, so that the principle of unanimity could stand but in certain select circumstances there would be some procedure for overcoming it.

From our point of view, minority rights, which may indeed be affected by this formula, and I think I would look to the creation of new provinces, for instances, as falling into that, are not the most popular of fashionable issues from time to time. Those are the issues that are going to suffer if this amending formula stays as it is.

Briefly, on constitutional conferences and the like, I think we certainly support the idea of yearly exchanges between the federal government and provincial governments. There is no question that this will certainly enhance federalism. If that is all section 8 said, that would be fine, but section 8 goes on to say, specifically with regard to conferences on the economy and such other matters, that they may discuss such other matters as may be appropriate or agreed upon.

The fact is--and I think a case has been made for this by Senator Eugene Forsey, who certainly is acknowledged as a constitutional expert--those clauses can be interpreted to mean that unless there is unanimity, certain basic issues will never come to light. With respect to the Constitution we will certainly discuss Senate reform and fisheries, but if the provinces do not agree with the federal government as to what else is going to be on the agenda, we may never see other issues come up.

From our point of view, there are some significant issues that ought to be discussed. Multiculturalism of course is only one. We may have very well want to include a whole host of issues, which we may never have an opportunity to discuss.

The other problem, of course, is that if constitutional conferences are going to be held from how on from behind closed doors, then I think the interests of the Canadian public is not well served. I think we have a democratic tradition in this country which calls for an active role of Legislatures, which calls for an active role of interested individuals and this accord does nothing to enhance that tradition.

You will see a summary of our recommendations on pages 34, 35 and 36. From our point of view, the most fundamental ones, if some sort of accommodation has to be made, are the recommendations made with respect to section 1.

There is no question that the congress wishes to accommodate the province of Quebec, as do many other sectors. The present situation is certainly not acceptable, but I think not to recognize the inherent rights of one third of the population who are not French or English and the one half that is not male is pretty close to an egregious error and certainly not to be tolerated.

I do not think we can rely on the courts to safeguard the rights of those segments of our society. I think our paper documents that and I think constitutional law bears this out. Where you have an important document which is couched in such ambiguous language, you can bet that those rights will not be safeguarded.

The Premier of this province, as we said at the outset, has promised that where the "distinct society" clause can be shown to have an effect on the constitutional rights of the individual, a change in the accord is possible. We trust he will follow through with that resolve.

1150

I do not think it is in anyone's best interests not to reconcile with Quebec and we certainly should find appropriate ways of doing so. I do not think we should throw this accord out. I think it is an excellent first draft. We think the reconciliation with Quebec should not occur at the expense of other segments of the Canadian population who do not deserve to be treated as less than full participants. That, we do not feel, is justice.

Mr. Chairman: Thank you very much. We appreciate your setting out the recommendations and some of the thoughts behind the recommendations. I am mindful of the time, and we do have another group that will be addressing us before the lunch break, if members could just be aware of that as we address our questions.

Mr. Cordiano: Very quickly and briefly, you have touched on a number of issues and by no means will I be able to do any justice with my questioning on all of the issues I would like to get into. The time is simply not there, but I would like to thank you for giving us a very concise and thoughtful brief. You certainly have done your homework. These are complex issues and we appreciate that.

I want to talk about a couple of things which you mention and which stand out for me. Looking at the whole notion of multicultural rights, when I look at section 27 of the Canadian Constitution Act, 1982, and at the Charter of Rights and Freedoms, section 27 obviously deals with multicultural heritage, we would agree that this section, having discussed this with the legal experts who have come before this committee, obviously does not grant rights. It is not a rights-granting section of the charter. You would agree with that.

Ms. Castrilli: Would I agree with that? Was that the question?

Mr. Cordiano: Yes.

Ms. Castrilli: Oh, yes. I thought I said that very clearly.

Mr. Cordiano: OK.

Ms. Castrilli: I do not think there are any substantive rights. Therefore, we really do not know where multiculturalism stands--it is in limbo at the moment--in relation to the "distinct society" clause.

Mr. Cordiano: Let us look at 1982. The mere fact that section 27 is added to the charter does not grant rights. Let us look at the definition of "multiculturalism." I have asked this question of various groups that have come before this committee and asked for their definition of "multiculturalism," and certainly I continue to do that on a daily basis because I think not all of us would agree on the same definition of what multiculturalism is, although there is some vague notion about what it is.

I think you would agree with me that multiculturalism attempts to define something that all Canadians would ascribe to it and that is that their

cultural heritage, regardless of where it is from, is meaningful to them and is something that we should be able to retain as individual Canadians.

When we get to that kind of definition, that might differ from a lot of other groups. They might say, "We have multicultural groups and we have ethnic groups and they need multiculturalism." That comes from 1982. I say to you, where is the difficulty in the accord or is there an advancement of that cause in the accord? Was there one at the point in 1982 when section 27 was added to the charter?

Quite frankly, there are no rights to multicultural groups that exceed the rights of any other individual in our Canadian society. That is not what I am understanding from all this. I am not a constitutional expert. I have certainly asked this question of the constitutional experts and they would agree there are no rights that exceed anyone else's rights in our country, any other individual.

Mr. Delfino: I am sorry. I thought you had finished. Before Annamarie may want to answer that question, I wanted to interject and say that we may not necessarily agree on the definition of "multiculturalism," but what we try to bring forth is that we do agree on the equal rights of all Canadians, and this accord should reflect the equal rights of all Canadians. We are proposing that it does not and that is fundamental as far as I am concerned, much more so than definitions.

Mr. Cordiano: What I am trying to get at, though, is how does the accord affect someone who is not English or French in their ancestral background? Are you saying that it somehow takes away rights that were there from someone who is of that background, neither English nor French? The only way you can say that is if you would agree with some people that the Charter of Rights and Freedoms is somehow eclipsed by what has been brought forward in the accord. If you are saying that, then that is a debate that certainly one has to pursue. On the whole question of multiculturalism, this is where I am having difficulty. If you could clarify that for me, I would appreciate it.

Ms. Castrilli: It is a very long question and I am not sure that I am qualified to give all of the answers I am sure it deserves. We are in a state of transition as far as I can see. Like all other societies, we are evolving towards a recognition of who we are. We have made steps. We have official bilingualism. We have a policy of multiculturalism. We have had it for 17 years.

We now have a federal act dealing with multiculturalism, which does give some assurances. That, of course, is not recognized in here because the federal act of multiculturalism was not introduced until well after June 3. Again, that is one of the other issues that I think ought to be put in the hopper and discussed and has not been here and could not have been there in 17 hours of negotiation. That is part of the problem.

Given that reality, given the fact that multiculturalism is acknowledged everywhere to be a fact of life, one would have thought that in section 1 of the accord you would have at least paid some lipservice to that. You do not throw it in under section 16, but if section 1 is, as has been said, nothing more than a description of what Canada is, then I suggest to you it has missed a very large component of what Canada is. That is our position.

Mr. Cordiano: If I could just ask you this, should that not have been done in 1982 as well? The requirement existed at that time as well.

Ms. Castrilli: To the extent that it could have been possible, maybe it should have been done in 1867.

Mr. Cordiano: That is my point. I think that job has been left unfinished and I think you make a very good point, that indeed, if we really believe in a multicultural society, then certainly we have to make every effort to ensure that nothing overrides that. Of course, the accord does not do that, in my opinion, because what was there before is there now in the accord under section 16. What you are putting forward to me, if I understand this correctly, is that you are asking for additional rights that are not there.

Ms. Castrilli: No, I think what we are asking is for a description of Canada that reflects the reality that is Canada.

Mr. Cordiano: But that, in essence, is like granting a right.

Ms. Castrilli: I do not think that is necessarily so. We can quibble as to whether there ought to be substantive rights attached to multiculturalism and I would say to you that if the federal government is prepared to enact an act on that basis, then clearly there is an intention at some point in time to give substantive rights which are not reflected in this document and could not have been at the time. There is no question there.

The fact remains that section 1--and I think the arguments you have heard with regard to distinct society bear this out; certainly the things I have read bear it out--should not give substantive rights to anyone. What I have heard that it is a description of Canada, and if that is the case, that is what we ought to be doing.

If we are now saying the "distinct society" clause, which we do not understand because there is no unanimity as to what it means, gives substantive rights to Quebec, does that not make the situation worse? Should we not know precisely what those substantive rights are? I am making the best case possible.

1200

Mr. Cordiano: I want to make one last point, one very brief point. I see what you are saying. The difficulty I have with that is that we have all kinds of descriptive passages even in the Charter of Rights and Freedoms. For example, who is going to define what a "free and democratic society" is? That passage exists in the Constitution of the Soviet Union, which many people would describe as a very totalitarian state.

Words are difficult to translate into action if the will is not there. So I think we try to be very clear and I am sure that all the lawyers who drafted the words, the legal experts, the constitutional experts, try to be very clear about what they mean. But we are going to have debates about that, are we not?

Ms. Castrilli: Yes, we are. I think the answer to your question, very simply, is that two wrongs do not make a right and just because you have ambiguities everywhere else or anywhere else does not mean you should tolerate them here.

Mr. Chairman: I think we can go on at some length there, but I think the issue is joined and, mindful of the time, Mr. Breaugh.

Mr. Breaugh: Two quick questions for you. One, it does seem to me that much of what you said to the committee today, and it was certainly well said and well researched, centres on the question of whether anyone has actually lost ground by means of this accord. If we could make that determination clear as to what is the relationship between the charter that came out in 1982 and the accord that came out this year, if we were able to clarify that situation, we would at least tell people what the new rules are or if there are new rules. Is that kind of central to your argument?

Ms. Castrilli: I think that is right.

Mr. Breaugh: OK. The second thing I want to pick up on a little bit here is the process stuff. We are always cursed with the notion that whenever we write a law, some fool judge out there will interpret it the wrong way, but there is nothing we can do about that. That is why there are judges and courts and lawyers and everybody has a legal right to appeal. So we cannot do much about that part of the process, but we certainly can do a lot more around the process before it becomes law, in terms of input, so that there is some clarity.

I am perplexed a bit with this problem about the process of how we came to have an accord and whether it in itself has really shattered perhaps even the best of intentions. I would be interested in your response to this. Various groups coming before us have no idea, and neither do I, as to what was the intention of the 11 wise people who put together these words. This was all done behind closed doors and it is causing immense problems.

I would like you to comment a little bit on the damage that I see being done by the process itself. If these people had held their deliberations in public, we would at least know, was there a hidden agenda that excluded the territories and the Yukon? Did they really mean to desecrate multiculturalism from one end of the country to the other? Just exactly what was the game plan and who were the players? Is it possible now to take this process and rectify some of these problems?

Ms. Castrilli: I think that is why we are here. We are confident that Ontario will do that in some way and that a precedent will not be set. If the first ministers choose in the future to have such secret rendezvous, we hope the provinces will see fit to have open-air discussions and exercise their free vote and require public input so that we will not have constitutionalized executive decisions. That is what concerns us about the process. We certainly hope that in Ontario decisions will not be made along party lines, but that there will be a free vote.

I think I said at one point we are not trying to suggest that all meetings ought to be under the glare of lights, but it would have been nice to know what was on the agenda at the time. Certainly, even with the talks leading to the 1986 Constitution, which were far from perfect and there were screams and hues and cries even then, at some point there was input. That is why section 27 was put in. That is why section 28 was put in. Without public input, those sections would not have been there and we would have been a poorer country for it.

Mr. Breaugh: I think you have proved your point this morning.

Mr. Delfino: May I make one point? Both members of the provincial parliament have referred to the whole question of the Constitution as wins and losses, and that may be the case. When we are talking in terms of questioning

whether we feel that multiculturalism has lost through the accord, that may very well be the case.

But what we are concerned about is the fact that we are not dealing with wins or losses; we are dealing with the fact that the reality of the makeup of Canada has changed in the last number of years. While certain rights and certain items may not have been looked at in that particular light and in that particular reality before, there really is nothing necessarily wrong with addressing that question now and recognizing the new reality of Canada.

Mr. Sterling: I am not going to ask a question. I just want to thank you on behalf of our caucus for bringing forward a very good brief. We have a great deal of frustration in our caucus with regard to the process that has gone on. In spite of how good your brief is, we are really tied in terms of what we can do because Premier Peterson and the other premiers and the Prime Minister have said they are not going to listen very hard to anything we do.

Ms. Castrilli: There is a hope on the horizon in response to the question you asked of the previous speaker about a reference to the Supreme Court of Canada. In fact, the Globe and Mail has announced that John Sopinka is planning to take such a reference on behalf of the territories. That may be of some assistance.

Mr. Sterling: I think that your work is important in terms of that anyway. Thank you.

Mr. Chairman: I thank you all for coming here today and making your presentation. We will certainly be able to go back and look at it in some detail. We thank you for taking the time to set out those views and we will certainly consider them.

Ms. Castrilli: Thank you very much.

Mr. Chairman: I would now like to call upon the representatives of the Toronto Jewish Congress. I will ask Mr. Lenkinski, who is chairman of the social policy committee of the congress, to introduce his colleagues. Perhaps we could come to order.

I apologize for the lateness of the hour. We do want to make sure we give you every consideration and make sure that we understand your concerns and issues. Perhaps, Mr. Lenkinski, you could introduce your colleagues and then proceed with your presentation.

Mr. Lenkinski: Thank you, Mr. Chairman, ladies and gentlemen. On my right is Les Scheininger, who is the past chairman and a member of the social policy committee, past president of the Jewish Family and Child Services and an officer of the Toronto Jewish Congress. On my far right is Rupert Shriar, who is the associate executive director of the Toronto Jewish Congress. On my left is Randy Spiegel, who is the social planning associate of the Toronto Jewish Congress.

Let me start off by apologizing for Mr. Rosenfeld who cannot be with us today. He is the president of the Toronto Jewish Congress and signed this submission.

TORONTO JEWISH CONGRESS

Mr. Lenkinski: I want to start off by saying that we appreciate and thank the committee for the opportunity to present our views on the accord

that is before you. This submission is before you on behalf of the Toronto Jewish Congress. It will be followed later in the month by a submission of the Canadian Jewish Congress which will address specifically a number of issues that I am not going to touch on, although some of them are in this brief by way of support of the views of the Canadian Jewish Congress in relation to appointments to the Supreme Court, in relation to duality and distinctiveness, in relation to all the equality rights that are contained in the Charter of Rights, which some people maintain are somewhat put in question by the language of the amendments.

1210

We want to concentrate on two items, very briefly. One is the question of immigration, because of our vital interest in that area, and the other is the issues related to social welfare concerns. As far as immigration is concerned, we concur in and join with the position outlined by the Canadian Jewish Congress that the government of Canada should have the whole jurisdiction in provision, reception and establishing of standards of immigration, of who is to be permitted to enter into the country. However, the integration services, as they are left with the provinces, are subject to specific agreements that the provinces, on the basis of the amendment, are to strike with the federal government in this regard.

We just want to state that our interest in that area is immense. We would like the province to take note, just looking simply at statistics, that about 50 per cent of the total immigration figures into Canada are accepted by the province of Ontario. I think Ontario has an immense concern in, first of all, settling, servicing, providing education and the whole gamut of problems facing immigrants when they settle in a new culture and a new country.

Turning now to the social welfare concerns that we have, I am going to read this part of the submission. The Toronto Jewish Congress is one of the major voluntary sectarian agencies in the greater Toronto area. We are concerned about the lack of clarity surrounding sanction and financial compensation to provinces opting out of national shared-cost programs. It seems apparent that if a province conducts programs or initiatives "compatible with national objectives," sanction and compensation will be given, even if the programs or initiatives lack similarity to the national initiative. This type of semantic manipulation could deny citizens of Canada social services intended to strengthen their ability and vigour.

We are likewise concerned that understood, accepted and expected social policies and developments since the Second World War may be at risk. The amendment in its current form reflects difficulties in maintaining comparable programs and services across the country. New national initiatives will find themselves most immediately affected. Similarly, the amendment lacks clearly delineated standards expected of shared-cost programs, an apparent departure from those expected under the Canada assistance plan.

Should the federal government propose a social welfare program with the intent of uniform benefits, the proposed amendment provides for the likelihood that the initiative will dissolve into different mechanisms with different conditions, perspectives and trusts, with no opportunity for portability. The ultimate results are the establishment of programs far different from those originally intended. Further, the federal government is stating at the outset that it will reward this behaviour.

The current amendment allows for policies of accessibility, eligibility,

standards and ??trusts service to so vastly differ from province to province as to inhibit mobility. For example, Ontarians currently covered under the province's health insurance scheme could be inadequately covered should a medical emergency occur while out of province. Individuals who will now be required to consider additional costs for private upgrading of their current policy face the possibility of incurring private medical expenses or remain at home, avoiding any risk of catastrophic expenses before making a travel decision within the boundaries of their own country.

A specific example of potential difficulties is exemplified by the recently announced federal funding initiative in support of child care. The principles, i.e., criteria that must be observed, to which provinces were formally required to conform, are now being replaced by "compatibility," i.e., capability of existing alongside our system. Power and intent are distilled. There is no common denominator, no principle of comparability to tie the social services fabric together.

The province of Ontario, on its own initiative, is effecting a substantial child care package, including the commitment of considerable funds for the program. Several issues remain in question and demand further consideration. While no support or sanction is intended, it is an unknown whether the federal funds to be expnded for child care will be added to enrich and expand the current provincial initiatives or be absorbed towards the costs already committed by the province.

Given the current inadequacy of child care spaces, it is our hope that the Legislature will respectfully recommend that the federal funds be used to augment the current initiatives in this area. In addition, consideration must now be given to what the long-term impacts of provinces uninterested in publicly supported child care, or those supporting for-profit child care, will be across the country.

In conclusion, those are several concerns arising from the 1987 constitutional amendment. This submission is forwarded with the hope that substantive consideration will be given regarding the philosophical, practical and political base on which the accord was proposed. The possible negative consequences the amendment in its current form may have on Canada demand serious public debate and attention.

Mr. Chairman: Thank you very much for zeroing in on several specific issues. As we said earlier today, some of these are ones that we have not spent as much time on, up until this point, so it is most helpful to the committee that we can try to look at those more closely.

Mr. Offer: I would like to thank you very much for your presentation. I would like to zero in on your concerns with respect to the spending provision. This morning we heard some concerns also revolving around that particular section. What I would like to get from you, if I might, is an expansion of your concerns with respect to that particular amendment in the agreement dealing with spending provisions. How do you see that it might impact on provincial programs?

Mr. Lenkinski: I think the best thing is by way of an example. The example is health care. The province of Ontario entered into the national scheme quite late. While the language in the Constitution at that point was not clear, it was not as specific as it is in the present amendment, and the present amendment provides for a province to opt out of shared-cost arrangements in provision of such services if the province establishes a problem that is "compatible with the national objectives."

What that means is unclear. It requires tremendous definition and when the province goes in to finalizing the deal, it is our intention to draw it to your attention so that you can discuss it with your federal counterparts, not to be faced with a myriad and patchwork of social programs across the country that are going to seriously impair the quality, the access and what we generally call the quality of life from province to province, from place to place.

Mr. Offer: Carrying on on that point for just a moment, and I know you realize that this is dealing only in areas of exclusive provincial jurisdiction. I know that is a given. It is my opinion that this particular section does meet a growing need in this country, and that is, a clarification that the federal government can enter into, with respect to shared-cost programs, and I think section 106 does that in terms of areas of exclusive provincial jurisdiction, and also give to our provinces the right to opt out as long as they provide a program compatible with the national objectives, which would address the provinces' particular particular concerns; a recognition that the services, for instance, which you provide in Ontario, have different stresses, different needs, different demands than the services provided by an organization such as yours in Alberta, British Columbia, or wherever.

This particular section adds a flexibility which was not there before, so that these particular needs and concerns might be better addressed in a more effective and evolving Canada.

1220

Mr. Scheininger: I think there is a recognition with respect to a number of points that you have made. Our concern is more of a universal concern. We recognize the need to provide for the regional disparities that exist within this country and we recognize also that this section deals with only those shared-cost programs that may be within the exclusive jurisdiction of the province.

Our concern is, first, with respect to the lack of clarity in the wording. The wording, as Mr. Breaugh has already indicated in a previous submission, is subject to interpretation by the courts and, obviously, other individuals. We try, and we attempt to the best of our abilities, to clarify wording so that the interpretation may be made on more narrow grounds than allowing a chaotic situation. We are concerned about the lack of clarity in the wording, especially the words used in the amendment to the effect, "compatible with the national objectives." We are concerned that those words may be interpreted in a wider sense than may be intended or understood at this point in time. So the wording is of concern to us.

Also, we are concerned that this particular amendment may, in fact, be counterproductive in that it may discourage the initiation of various national shared-cost programs, in that there may be, in fact, a lack of accountability when you use the vagueness of these words, a lack of definition in the programs and in the long run, over a period of time, the federal government may be discouraged in initiating these types of national shared-cost programs that are within the exclusive jurisdiction of the provinces.

We see it as being important that the federal government be encouraged as much as possible to free up funds for those programs that we feel, on a provincial basis and in terms of our community, to be important. We do not want to have anything, if we can avoid it, that would discourage, over a period of time, the provision of funds for these vital programs.

Mr. Offer: I do not know if I share that particular view that it would be a discouragement. I do not see that. I see this as a clarification of federal jurisdiction in this particular area. I see this as giving a flexibility to the provinces, and I see this as giving the different social agencies in the examples which you brought forward, another place to input your concerns as to what these particular programs ought to be. No longer will you have to sit back and listen while the province carries out a federal program of cost sharing, but you can also now input to the province as to why a particular program should be altered, still keeping within the national objectives.

That is my point, that it provides to you an even greater place to input your concerns with respect to the services that you provide. I am sure, as we proceed with this particular committee and hear other persons dealing with this particular section as well as others, we are certainly going to be grappling with those concerns.

Mr. Eves: Do you have any specific recommendations with respect to possible changes in the language of the accord? For example, the first group we heard from this morning was the Social Planning Council of Metropolitan Toronto. They were concerned about the same section, section 106A, but they did not go so far as to say that they thought the section should be changed. They thought that perhaps support, pending clarification of its provisions, might be reserved by the province, by this committee. They were looking for an interpretative document that could be concluded, they say, up to two years subsequent to the accord. What would your approach to that be?

Mr. Lenkinski: I do not think that you can require a voluntary organization such as ours to have access to resources and to specialists, to be able to come up with language that would cover what we want and also be acceptable to 11 governments across this country.

We all realize that this thing is a product of very intense, very hot, sometimes into-the-night negotiations between these various governments in order to come up with the deed. What we intend with our brief is to voice our concern, to alert the legislators in the province that the concern we have is valid. It impinges upon the delivery of services that we depend on and the quality of life in our province. We ask you, as legislators in this province, to be particularly careful that the definition of these programs and the parameters of the provision of these services do not water down what would be a useful net of social services that would benefit the province.

Mr. Eves: I understand that. I was not asking you to give me a written definition of what you think section 106A should be. I was just asking if you thought that this could be accommodated without actually amending the Meech Lake accord. I think that you have indicated to me in so many words that may be possible.

Mr. Lenkinski: You started out by saying that this is within the purview of the province. Then the onus obviously is on provincial legislators to make certain that the definition you ascribe to all of the programs here is one that would do two things: one, it is meeting the criterion of accountability to the federal government for the money it provides and, two, it is being done to the benefit and advantage of the citizens of our province.

Mr. Breaugh: I wanted to pursue a bit some of the concerns that I would share on the provision of social programs. It is not that any of us are opposed to the idea of shared costs or setting of standards or negotiating how a service is provided. In Canada that is pretty much the way we do things.

I think what concerns us is that the wording of certain sections of this act introduces some new language to us, and we are a little apprehensive that we can continue to operate in the way we always have. Specifically, the social planning council in its brief made the point that there is apprehension here, and rightly so, and that perhaps the onus should now go back on to the governments to clarify exactly what they meant by that and that perhaps it would be a useful exercise to set our civil servants to write out a further interpretation of exactly what was meant there. Then maybe, if we could see it in that context, we would recognize that, yes, this is the way we build roads, provide hospitals and provide university services. We have always done that.

I think we should recognize too that even though medicare has been in operation in Canada for some time now, we are still arguing over the provision of services in different provinces and whether an Ontario health insurance plan card is going to do me any good at all at a hospital in Montreal. So we have not quite perfected the system yet.

But it did strike me that the social planning council in its presentation had identified the nature of the problem, which is clarity. We do not know what this accord means. Are we changing gears here? Is there a difference in the way we operate? I would like to get your response to their position, which was essentially: "We're not prepared to say no to this thing. But there are a whole lot of questions that must be answered." People must provide those answers, frankly, because many of the social services in Canada are provided not by governments directly but by other agencies that are an arm's length away, and they have to know if there is a change in the rules here.

1230

Mr. Scheininger: I think, in a nutshell, we are in the same position as the social planning council, and if there is a message to be received from our brief, it is that these amendments, particularly those dealing with the shared-cost programs, lack clarity.

We are uncertain, and you have expressed it also, Mr. Breaugh, with respect to the ultimate effect of this particular amendment. Mr. Offer had one interpretation of the possible effect. I may have a differing interpretation in terms of the long-term effects of section 106A. I think that is illustrative of the problem that we face. We do not know how this will impact upon the receivers of the services, and that is what we are concerned about: how the money and the services will ultimately flow to those people who require the services and the money.

The point that has to be made, and we agree with the social planning council, is the lack of clarity in the proposed amendment. I am not sure, however, whether interpretative documents would be sufficient in terms of how the courts may interpret section 106A. I remember what I thought the Charter of Rights was supposed to mean, and I read the interpretative documents that came out contemporaneously and subsequent to the Charter of Rights. I am now in a different position, compared to what I thought I was in 1982. I do not think, it would be my respectful submission, that interpretative documents would be of great assistance when we are dealing with a constitutional document. I raise that concern to you.

Mr. Breaugh: Let me just raise one final thing that I would like to get your reaction on. I think one of the things that concerns me is precisely that this is a constitutional document. We are used to the notion that we all

decide we like medicare, we pass an act somewhere and it is supposed to happen; then our civil servants negotiate how much money this is going to cost, who is going to pay what share, how we provide the service--all of that. That is traditionally the way we have done things in Canada--almost everything, in fact.

Now we introduce a Constitution, and people are going to go to court and they are going to say: "I don't care whether your provincial government wants to negotiate the provision of this service. I have a constitutional right to it, and I am going to go to the Supreme Court of Canada and they will say yes or no. Monday morning the judges will make a decision public, and Monday afternoon the provinces will provide services in a different way." That has just happened to us.

We are into uncharted waters here, which is causing me some concern. Where I normally would say, "Well, I'm not really worried about the words that were used in any section of the Meech Lake accord," now I have to remind myself that this is a little different ball game than I am accustomed to playing.

Normally--we are Canadians--we would have a conference on this. We would set up a royal commission. We would all go to Ottawa, or Victoria or Charlottetown. We would discuss this for a while and we would negotiate our way out of this mess. Now someone else may have a legal right to go to court. A lawyer and a court judge may make a decision that throws all of the rest of this carefully thought out process out the window.

That is the anxiety that I would share with you and with the social planning council about this kind of thing.

Mr. Scheininger: I think the point has been made, and it is the same point we are making, that there is a necessity for precision in language when you are dealing with constitutional documents.

Mr. Chairman: Miss Roberts has one last, quick question.

Miss Roberts: I hate to agree with my friend, but we all have the same anxiety, I think.

Mr. Breaugh: It happens every once in a while.

Miss Roberts: There is very little, as you have just indicated, that you can do, even in the clarity of the language; it will be interpreted by a court. Once we have set up our Charter of Rights and Freedoms, once we have gone on the path towards a Constitution, our entire way of looking at how we as individuals react with the government may have changed and certainly has.

I think what we are trying to do now is to determine how we can set up a process which in the long run, as my friend has indicated, will come to the consensus, come to the agreement, come to the language that is going to be interpreted, sooner or later, no matter what we do; even your interpretive documents are going to be interpreted by someone.

Do you have any suggestions that might help us in the development of this process?

Mr. Scheininger: Obviously, we had difficulties with respect to the initial process. That has been mentioned before and it has been mentioned on

numerous occasions. I am sure that many delegations before you will express similar concerns. The haste with which the accords were developed and the haste with which they were signed was of great concern, and still is of great concern, to us. I think that haste has resulted in a certain lack of clarity in the language.

When we talk about process, though, I think the province has done something by the creation of this committee at least to alleviate or to attempt to alleviate the problems in process. I hate to throw the ball back in your court, but I would submit that if the province is serious in terms of giving careful consideration, is serious about listening to these delegations and is serious that it can be swayed at this point in terms of the accord, then the process is here.

With respect, I think it is a responsibility of this committee and of the committee that will be or is already established in Manitoba to also consider the accord, and I think it is a responsibility of the Legislature ultimately, if you deem that there are such concerns that merit a re-evaluation, that the Legislature appropriately debate those concerns.

I suggest that we have accepted the status as it now is in terms of the process. The Toronto Jewish Congress is--

Miss Roberts: You are limiting yourself to a document, to an accord. Our Constitution is going to go on a lot longer than I live, the Lord willing. I would like you to address that as well, not only this accord but also what is going to happen, because each year we are going to be meeting.

Mr. Lenkinski: Again, we consider the process that the Legislature of Ontario has established a forum for people like ourselves, who are involved in the provision of these services. We represent 12 agencies providing a variety of services, most of whom are obtaining funds from government sources in the provision of these services. You provided us with a forum, where we are giving you concerns.

This is a process that does not finish with the signature on a document; it is a process that will be continued for as long as we have some access to influence the legislators, not only about the dry language of a document but about the practice and how that practice is reflected in the provision of the services. I think the obligation of the province, of the community and of society will probably bring the desired results.

Mr. Chairman: Thank you very much for being with us. I think particularly those last comments are very helpful, because that is an issue we are grappling with as well. As I mentioned before, you have touched on some issues that for us, as a committee, are ones we have not gone into in as much detail as we have this morning, and we are grateful for that. Thank you again for coming here and meeting with us.

Mr. Lenkinski: Thank you for the opportunity.

Mr. Chairman: We will stand adjourned until two o'clock.

The committee recessed at 12:39 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

WEDNESDAY, FEBRUARY 17, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Sterling, Norman W. (Carleton PC) for Mr. Harris

Clerk: Deller, Deborah

Witnesses:

From the Ontario Confederation of University Faculty Associations:

Starkey, Dr. John, President

Epstein, Howard, Executive Director

From the National Union of Provincial Government Employees:

Clancy, James, Vice-President; President, Ontario Public Service Employees
Union

Brown, Larry, Secretary-Treasurer

Usher, Sean, Director of Special Operations, Ontario Public Service Employees
Union

From the Chiefs of Ontario:

Peters, Chief Gordon, Ontario Regional Chief

From the Congress of Black Women of Canada:

Augustine, Jean, National President

Benjamin, Akua

AFTERNOON SITTING

The committee resumed at 2:04 p.m. in room 151.

Mr. Chairman: I call the committee to order. Our first witnesses are the representatives of the Ontario Confederation of University Faculty Associations. We welcome you here. I will call on Professor John Starkey, the president of OCUFA, to introduce his colleagues. Please proceed with your presentation and we will follow it with questions.

ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS

Dr. Starkey: Thank you, Mr. Chairman. On my extreme left is Helen Breslauer, the chief researcher of our organization, and on my immediate left is Howard Epstein, our executive director. It is he who will be making most of the presentation this afternoon, having particular expertise in this area.

By way of introduction, I would like to make a couple of comments. You have before you a copy of our brief. We make it very clear at the outset that we are addressing only two issues of the Meech Lake accord, and these are two issues which, in fact, we believe impact or potentially impact upon post-secondary education.

The first is concerned with the locus of governmental power in dealing with post-secondary education. Specifically, we are concerned with section 106A, which means or might mean--we are not sure--that the relative roles of the provincial and federal governments may or may not change with respect to post-secondary education. The second issue is the threat to equality rights. Again, here specifically our concern centres upon the groups which are excluded under clause 16 and those groups which are named. This does not ensure that the "distinct society" clause, clause 2, will not affect women's rights.

It is on these two specific issues that we wish to make our presentation this afternoon and on which I will ask our executive director to speak.

Mr. Epstein: I think we are very conscious of coming before you today, particularly with respect to the first point, advocating a view of the proposed Meech Lake accord that may not be consonant with several others that you have heard. That is to say, I think there is a fairly common view that has been expressed with respect to the accord as a whole, and sometimes with respect to the proposed section 106A of the Constitution, that in general there is a strengthening of provincial powers as over against the federal government.

That is a matter we wish to question, not with respect to other sections of the accord--that is, not the matter of appointments to the Senate or to the Supreme Court, or matters of amendment, or matters of bringing in territories as provinces--but confining ourselves to the proposed section 106A. We wish to question whether that is an accurate interpretation; that is, whether it really does represent a shift of powers to the provincial governments.

At the very least, we are of the view that section 106A is extremely ambiguous. We also are rather inclined to think that there may be good reason to read it as going so far as to represent a shift of powers in the other direction. We have serious concerns on both counts; that is, if our interpretation, if the suggested interpretation of a shift to the federal

government is correct, we have some concerns. If, however, it is to be seen as ambiguous--which we think is the very least that can be said about that--we are of the view that the ambiguity has to be characterized as an egregious ambiguity.

If that is the case, we think that in the end it probably does not behoove the province, along with the other provinces and the federal government, to amend our Constitution in a way that introduces such serious ambiguity. We are concerned that in the end, egregious ambiguity is egregious error. If that is the case, if that is the test you are proposing to apply when you write your report, you might consider ambiguity in a somewhat more serious light than perhaps you previously have been inclined to think of it.

Let me remind you of what it is that the proposed section 106A has to do with. It has to do with what is called the spending power proposal. Our view at the moment is that the existing state of constitutional law has been that in areas that are exclusively within provincial jurisdiction, quite obviously the federal government is not supposed to be passing legislation and vice-versa; that is, the provinces are not to legislate in areas of federal jurisdiction.

On the other hand, it has been well recognized for any number of years that the federal government can, if it chooses, use its money power, its spending power, to give money either to the provinces or to institutions which are within provincial jurisdiction. That has not been regarded as unconstitutional. The tricky question, however, becomes the status of any actions by the federal government which purport to transfer money either to provinces or to entities which are regulated by the province and, at the same time, attach conditions.

We have seen this emerge as a so far unchallenged mode of federal government dealing with the provinces in matters of health, education and welfare, most typically I think with respect to health in the Canada Health Act, which provides a model which has not only been in place for a while, but which has been touted by many as a potential model for the way the federal government might go with respect to higher education.

You may not recall, but at the time of the fight over Ontario's extra billing legislation, it was announced by the Canadian Medical Association and the Ontario Medical Association together that they were proposing to challenge the constitutionality of the Canada Health Act. I myself remembered this only from press reports at the time. It seemed to have disappeared from the public agenda, but I did track down what had happened to this threat of a lawsuit. Indeed, there is such a lawsuit outstanding. I spoke with representatives of the Ministry of the Attorney General of Ontario who are engaged in the preliminaries of this law suit. There is a challenge to the constitutionality of the Canada Health Act which, although it has not been a matter for much public discussion since the time of the banning of extra billing, is none the less an issue that is still alive.

We tend to think there is some substance in the challenge, and the challenge is precisely on that point that I said had hitherto not been dealt with by the courts; that is, the question of whether the federal government can, in giving money to an area which is within provincial jurisdiction, attach conditions. We are concerned not, of course, about the health area, which is not our area; we are concerned whether this will provide a model for the higher education area.

If the case is that the attaching of conditions with the transfer of money by the federal government through the mechanism of legislation is unconstitutional in health, it will probably also be that for higher education. If that is the case, however, the proposed section 106A will, in essence, mean that the doubt about the federal government's power to do that will be removed, because what section 106A does is it says that in matters of essentially health, education and welfare it comes down to the federal government can transfer money to the provinces and attach conditions. True, the province can opt out, the province can be reimbursed if its programs meet the federal standards, the federal objectives.

None the less, what that clause does overall is it purports to allow the federal government to clearly attach conditions to the transfer of moneys, which has never been dealt with as a question before and which is of very dubious constitutional status.

Mr. Chairman: Can I just clarify that? The Canada Health Act case you are referring to, is that still before the courts?

Mr. Epstein: Absolutely. There has been no judicial determination on it at all, even at the lowest level. The case is a preliminary case, although it was filed in May 1987. At this point, so far all that has happened is that the opening documents have been filed by the Ontario Medical Association and the Canadian Medical Association as plaintiffs, along with some individuals as plaintiffs, and the federal Minister of Justice and the provincial Attorney General (Mr. Scott) have filed their responses and the process of discovery is in the works. It has not proceeded to court yet at all, but all the preliminaries are been done.

My point is, though, that something that had never been challenged before--because everyone who was in receipt of the funds was, up until that point, happy to take them and not about to challenge the constitutional structure, obviously--ran into a snag with respect to the banning of extra billing and the doctors were prepared to take it that far.

We are not here to discuss the extra billing, of course. That is not the issue. The issue is the model of the Canada Health Act.

We are concerned that there may be this shift of powers that is of some concern to us, particularly if it is seen in an overall context of a movement towards federal government steps with respect to higher education. On pages 5 and 6 of our brief, I think we identify what seem to us to be a number of significant moves by the federal government with respect to higher education over the last decade.

However, it is really the question of ambiguity that, in the end, we think must be a concern for this committee. That proposed section 106A is full of phrases which are obviously going to be subject to judicial determination, such as, what is a "program or initiative"? What does "compatible" mean? What is a "national objective"? All of those phrases introduce such a serious element of ambiguity that we wonder what it is the provincial government thought it was signing when it put into place section 106A.

We wonder whether the intention was to strengthen federal powers. Was the intention to strengthen provincial powers? Was the intention by a group of premiers, many of whom are lawyers, to stir up litigation? It seems to me that

there must be an answer to that and, yet, in the inquiries we have made of the advisers to the Premier (Mr. Peterson) on intergovernmental affairs, or the opposition parties, we have not really received any satisfactory answers as to what it is they actually thought they were doing. We would rather like to hear, in the report of this committee, what it is the committee thinks was being done.

This is the crucial issue for us with respect to our area, which is education, in this case higher education, what it is the committee thinks this clause actually accomplishes. It is far from clear and, as we say, it should be characterized as a matter of, to take up the Prime Minister's words, "egregious ambiguity."

If I could move, however, to the second part of our submission, it has to do not with section 106a but with a matter that I am sure has been brought to your attention before. It is the question of the way the equality rights section of the Charter of Rights and Freedoms as it exists right now, section 15, and particularly the interplay of section 15 with section 28, which purports to guarantee sex equality rights, will be affected by the "distinct society" clause.

I think the issues here have probably been laid out for you on a number of occasions. They are quite clear. It is the problem of whether in introducing the "distinct society" clause and then saying it is not meant to affect the rights of aboriginal peoples, it is not meant to affect certain other rights, at the same time, by omitting to mention the other equality rights, particularly those of women set out in section 15 of the charter, the intention was that the clause could be used to override that.

That is not a fanciful suggestion. It has been seriously debated by constitutional scholars, two of whom have written long guest editorials in the Financial Post this past fall: Dean Lederman--perhaps you have seen his paper--and Professor Beverley Baines. Perhaps you have seen her article as well in response to Dean Lederman's.

We take the view again that there has been such good work done and a lot of effort put into establishing the equality rights, and especially the specific inclusion in the charter of nondiscrimination on the basis of sex, that it would be very unfortunate if, either deliberately or through ambiguity again, there were to be a threat to those rights. Ambiguity will inevitably lead to litigation and delays and will also have a chilling effect, in our view, on what is a serious and important social movement.

We are inclined to think that, again, the exclusion of the rest of the equality rights creates a serious ambiguity that we should characterize as egregious. Given these two points, we are inclined to repeat to you again--that is the point about the egregious ambiguity with respect to section 106A and the egregious ambiguity with respect to the equality rights--that it would be well within your mandate to conclude that there is egregious error simply on the basis of ambiguity because we cannot imagine why it is that you would want to write such ambiguity into the Constitution.

We would welcome any questions.

Mr. Chairman: Thank you very much. It is interesting; I think today will probably be deemed section 106 day. It is good, because I think it has really helped us to focus our thoughts on that. Again, your focus is different from the others we heard this morning; not necessarily in terms of concerns about it, but I think your perspective is a different one.

Mr. Allen: I appreciate the fact that the Ontario Confederation of University Faculty Associations has come before the committee in order to present its views on the Meech Lake accord and to do so from the perspective of problems that it might entail for the education sector, which is lodged, of course, primarily under the provincial powers in the British North America Act but which has been impacted over the years very heavily by federal spending.

If I might, I think that you have perhaps left the case a little bit abstract and I wonder if you could perhaps bring it down to earth for us a little bit in terms of some scenarios that you see developing under one interpretation and under another, with respect to section 106A.

For example, if in fact this does entrench federal power with respect to conditions made on shared-cost programs and federal spending power capacity, is that, in your view, good or bad from the point of view of the education sector or, to put it from the other side, what is there to protect at the level of provincial initiative and provincial power that makes it important that this not happen? Or, by the same token, is it important that it do happen?

Mr. Epstein: Let me give you one possible scenario. If the interpretation that section 106A will strengthen federal powers is correct, and the federal government were to exercise the powers in the area of higher education as it has done under the Canada Health Act, one possibility would be as follows.

1420

The federal government could say that the money it now transfers to the provincial governments for use in higher education would come only on condition that the different provinces established programs in the universities with set numbers of enrolments in different programs. Hence, they would be able to say, out of Ottawa, that nationally there would be places for 50, 100 or 500 petroleum engineers across the country; there would be places for 5,000 sociologists; there would be places for 15,000 schoolteachers. Those kinds of possibilities at that level of detail of planning could attach to the transfer of moneys.

The threat that would attach is that the money would not be transferred to a province that did not comply. If a province wished to opt out, it would have to have something that was compatible. If that word was meant and interpreted as a strong word, the provinces would have to match the federal central planning for the labour market side of the economy. It seems to me that one might well question whether this is good for higher education or good for the economy.

Mr. Allen: I gather you are not contesting federal spending power per se and you are not raising a question about that. As you know, one of the major problems with federal spending power without attached conditions has been that in the higher education sector, dollars have sort of trailed off in all sorts of other sectors of provincial spending and have not been kept under the control of objectives or standards, which of course has been the problem on the other side.

Your scenario is a highly detailed intervention from the federal objective as distinct from a broadly framed objective. Is your concern really between those two poles? Is your concern about specific federal guidelines, highly detailed, which would try through the university and post-secondary spending, for example, to seek to accomplish manpower objectives and economic

objectives as distinct from educational ones, or is your concern that there be any objectives at all?

Mr. Epstein: We are certainly not objecting to the existence of the federal spending power. It is well recognized that the federal government has a constitutional right to transfer money in aid of provincial programs. Indeed, we think that the Charter of Rights entrenched the obligation of the federal government to do exactly that through equalization payments. The existing section 36 of the charter simply says that the federal government has to transfer moneys around so that public services can be at a reasonably equal level. Section 106A seems to us to be a bit of a backing away from that.

The example you gave, of money transferred for higher education being used for other, noneducational purposes, I think does not really deal with the question of federal objectives. The money should undoubtedly--and it could well be proper for the federal government to say this--go for a particular purpose in the sense that it should go to education or should go to health. The question is the level of detail. It is certainly true that since the federal government did not say in the established programs financing legislation that the money had to go to higher education, although that was the context of the negotiations, some provinces have actually used the money, as you say, for other purposes.

The question is indeed the level of detail. I think what section 106A contemplates is that programs with objectives, which sounds like a much more detailed matter than simply saying money should go for education or money should go for health, will lead the federal government possibly into wishing to put in place a great deal of detail.

Certainly, the example I gave was one which posited a very activist federal government. Yet even if you come at some removes back from that activity, one could imagine a federal government getting into programs with objectives that were, although not so detailed, none the less very interventionist. It certainly is a continuum, I would certainly agree.

Mr. Allen: Just a final observation. Professor Hogg, when he was with us, gave us the opinion that probably the most you can say about this clause and about national objectives was simply that the money had to be spent on what it was transferred for. I do not know whether that gives you a sense of relief or not, and there are probably others who will say otherwise.

Mr. Chairman, if someone does not come back to the equality stuff, I will, but I will yield the floor for the moment.

Mr. Chairman: Just briefly, as a followup to that particular question--again I want to be clear here--your concern with section 106A is not that you necessarily want the federal government to have a much more specific role; in fact, you would have a certain concern if that really did not get too specific. I think one of the views that have been expressed on this is that while this deals with provincial areas of jurisdiction, some people feel this is going to limit the federal government in a broad sense from being involved. But you would like it made clear so that if you are dealing with the province of Ontario on whatever the educational or post-secondary issue might be, when the funds are transferred, and I think it is elsewhere in your brief, you want a certain freedom for the university in determining itself where and how those funds might be spent.

Mr. Epstein: I think you have understood our position quite well. I would say that university autonomy is certainly one of our main concerns. We

do not purport to speak to what is best in the areas of health and welfare. Our comments really are confined to observing what we think the impact of proposed section 106A would be on the higher education area.

Mr. Chairman: Thank you.

Mr. Epstein: Can I just say something about Professor Hogg? I certainly have great respect for Professor Hogg and his opinions. On the other hand, I have also just been reading court judgements in which his texts have been cited by judges in the midst of saying they did not agree with him.

Mr. Chairman: Lawyers and economists.

Mr. Eves: I too would like to congratulate OCUFA on a very well put presentation. My friend Dr. Allen has addressed your concerns about section 106A. I would like to address the second issue that you raise, and that is women's equality rights.

I quite agree with you--in fact, I could not put it more succinctly myself--that there is at least some ambiguity raised by the way the accord is drafted as to whether or not these rights are going to be affected, although there are others who obviously disagree and argue about sides. It is easy to argue about sides, and there are indeed some very talented people on both sides of the issue; however, I would think that if we are going to be entrenching this in the Constitution of Canada, it is only common sense to clear up whatever ambiguities we have now, if possible.

When Professor Baines was here before us--in fact, she was one of the very first witnesses, if not the first witness, we heard in this committee--she suggested that she would go so far as to say that an all-encompassing amendment to make sure that all rights and freedoms as defined in the Charter of Rights and Freedoms would take precedence over the accord. I presume you would agree with her philosophy in that regard.

Mr. Epstein: Absolutely. It seems to me a very sensible suggestion.

Mr. Eves: Thank you.

Mr. Elliot: I too would like to thank you very much for coming and giving us such a nice overview so quickly, so that we have some time for questions in the short time we have.

I respect the problem you have with respect to retaining the autonomy of the university. I feel as strongly as you do about that. As a committee member, I would really appreciate it if you would take this opportunity for a few minutes to expand on that and perhaps suggest to us how section 106A might be modified or how some sort of guidelines might be put in place so that the autonomy of the university community might be retained so that both provincially and federally you are not under the gun all of the time to be accountable in such a way that you lose the autonomy at the university.

Mr. Epstein: It is difficult. It is not impossible, but of course it is difficult. That gets me back to the point I made before about not wishing to attempt to speak on behalf of health and welfare issues so that any modifications we can suggest are not intended to affect what they might see as desirable in their areas and what you as legislators might think is an appropriate division of powers with respect to those areas.

With respect to higher education, we have not worked out a text for how section 106A might usefully read. It might usefully not exist; that is, it might be simply be left out with respect to education. We could simply live with the constitutional status quo at the moment.

?? Miss Stoner: Does everybody support that?

Mr. Elliot: I would like to ask Professor Starkey if he might have a comment on this too from a faculty point of view.

Dr. Starkey: As Howard just said, we are very much aware of the fact that section 106A affects more than education. I do not think we want to get involved in trying to rewrite a clause now, in the cold light of day, which the Premier and the Prime Minister were not able to write in the heat of the night.

1430

It seems to me that from the point of view of education, it is not well thought out the way it is worded, because it really does not address the post-secondary education issues. For instance, on the face of it, it seems as though it is only going to affect new transfer payments. Of course, one can bring education in by simply rewriting the current transfer payment legislation, and then it will apply. If that was not the intention, then education is indeed excluded.

Maybe it does what Howard has suggested might be an acceptable way: exclude education. On the face of it, it does, but we are not sure that was the intent of the people who wrote it. Again, I guess we come back to the ambiguity. Tell us what you think it means, and then I think we can respond as to whether that is good and how it could be improved.

Mr. Elliot: So it would be a lot better, in your mind, if we clearly stated that it is just new programs and that this automatically excludes educational considerations.

Dr. Starkey: I think that would clarify the situation for us, certainly. As our brief points out, we are not particularly thrilled with the status quo, but also we are not pleased with any changes that might come out of this, especially since we do not know what the changes might be. If we knew what the rules of the game were going to be--i.e., that this does not apply to higher education--then I think we would be in a much better position to respond and to do what we in fact do anyway, and that is to lobby the provincial government.

Miss Roberts: You indicated with respect to the status quo that the status quo is in particular a challenge that is now in effect that might do this in an even harsher way than you expect to get from the ambiguity that is here. Even if we do pass this, if that particular piece of litigation goes on, it might come out just exactly opposite to this, or it might refine it in some way.

Mr. Epstein: One of the possible results of the litigation that is now a challenge to the Canada Health Act would be to recognize that the federal government, if it transfers money for a provincial purpose, is allowed to attach conditions. That is certainly one possibility. When we look at that as a possible result, we are not enamoured of it, and yet it goes a little further, I think, than we were suggesting here to propose to you that you would want to oust federal jurisdiction entirely. We are not suggesting that.

Mr. Chairman: I would like to thank you very much for coming today and making your presentation. As I think we have all noted, there are some thoughts and ideas there that we have not heard before, particularly with regard to section 106A and the educational aspects. I find that a very interesting prospective and we are glad to have it.

Mr. Epstein: Could I make one final point? I would point out that although we of course represent the university sector of higher education, I noted that there are a number of educators who are members of your committee. There is reason to think that our concerns would not be confined only to higher education.

Mr. Chairman: Fair enough. I did not want to put that mantle on you as well. Thank you very much for being with us today.

I would ask the representatives of the Ontario Public Service Employees Union if they would please come to the table. If I might, once you are settled, I will ask the president, Mr. Clancy, to introduce his colleagues and we will then turn the microphone over to you. We will be in your hands. After your presentation, I know we will have some questions to direct to you. So, Mr. Clancy, if I might ask you to proceed.

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Mr. Clancy: With me this afternoon, to my immediate left, is Larry Brown, the secretary-treasurer of the National Union of Provincial Government Employees. To my immediate right is Sean Usher, the director of research, education and campaigns for OPSEU.

The National Union of Provincial Government Employees, representing 292,000 employees, and of which the Ontario Public Service Employees Union is a component, welcomes the opportunity of appearing before you in your consideration of the Meech Lake accord.

Your committee's deliberations challenge the view that the accord is beyond the reach of criticism and amendment. The Constitution belongs to the Canadian people and we urge your committee and the Legislature to affirm their right of discussion, criticism, change and final approval.

The Ontario Public Service Employees Union, NUPGE component, represents over 90,000 public sector employees in Ontario, of whom about 65,000 are directly employed by the provincial government. The other 25,000 work in various public sector agencies and institutions involved in education, health and social services. Fifty-four per cent of our members are women.

Both as public servants and as citizens, we have a vital interest in the process of government and in the appropriate allocation of power as between the federal and provincial levels. The process by which this allocation is altered, in fact as well as in law, to meet changing circumstances and needs is of no less concern to the members of our union.

Accordingly, the Ontario Public Service Employees Union, NUPGE component, is pleased to submit its assessment of the 1987 constitutional amendments known as the Meech Lake accord. We are not, however, intoxicated by the "spirit of Meech Lake" with which the drafters of that accord have celebrated its negotiation. In fact, we have the gravest concern about many of the substantive provisions of the accord.

We will begin this brief, however, by dissenting strongly from the process by which Canada's constitutional arrangements were so extensively modified in the first ministers' meetings last April 30 at Meech Lake and June 2 and 3 in the Langevin Block.

Following the constitutional process which culminated in the 1982 patriation of Canada's Constitution and the adoption of the Charter of Rights and Freedoms, a distinguished trio of participants and observers identified the need for an "adequately deliberate, open and democratic" process to be in place for any further constitutional amendments.

In our view, it would be difficult to conceive of the Meech Lake process as anything other than hasty, closed and undemocratic. Far from opening up the constitutional process since 1982, it is disturbingly apparent that the first ministers have constricted it and thereby diminished the rights of the people of Canada to participate in the making and remaking of the fundamental rules which govern the affairs of our country.

OPSEU does, of course, appreciate the opportunity to make this presentation to the select committee, and we indeed trust that our views will be given weight in your assessment of the Meech Lake accord with which you have been charged. Yet we are bound to emphasize that inviting comment on constitutional arrangements already finalized and signed in the course of a series of closed-door meetings of first ministers falls far short of the participation which should characterize the constitutional process in a free and democratic society. Indeed, the 1987 machinations of what Professor Bryan Schwartz has called "a cabal of first ministers" have unarguably given far less scope for public input into the constitutional process than we enjoyed during the discussions which led to the passage of the Constitution Act, 1982.

It is striking that the 138,000 citizens of Prince Edward Island were given an opportunity to vote on the proposed fixed link to the mainland, while the voters of Canada as a whole have no chance to exercise their franchise directly on the Meech Lake accord.

This union's members are of course concerned as citizens with the manner in which our governmental system is modified; but they also have an attachment to democratic decision-making as union members. OPSEU undertakes a deliberate and thorough process of determining the members' wishes before sitting down to bargain collectively with the employer.

Those of us used to the demand-setting process within OPSEU find the haste, secrecy and elitism of the Meech Lake process absolutely unacceptable. Mr. Mulroney and the 10 provincial premiers struck their deal in a closed meeting at a Quebec resort before divulging its general thrust to the country and went on to change its provisions significantly in a private, all-night, horse-trading session in Ottawa's Langevin Block.

We have no hesitation in asserting that the way OPSEU negotiates terms and conditions of employment has far greater moral legitimacy and practical effectiveness than the 11-man huddle of Meech Lake.

1440

OPSEU strongly urges members of the select committee to reject the accord, both because of the unacceptable way it was negotiated with the provincial premiers, who have called upon you and other legislators to rubber-stamp it, and because of its array of substantive defects, to which we now turn.

OPSEU considers that there is much wrong with the provisions contained in the Meech Lake accord. But we are also dismayed that the document fails to propose much-needed improvements to the Charter of Rights and Freedoms. We therefore urge that the resolution before you be amended so as to initiate the process of strengthening the constitutional protections for individual rights in the two areas of freedom of association and rights to participate in the political process.

Despite assurances during the 1981-82 constitutional process to the effect that freedom of association encompassed the freedom of workers to organize into trade unions and conferred the right to bargain collectively and to strike, OPSEU and other unions have found this interpretation of section 2(d) of the charter rejected by the courts.

Chief Justice Brian Dickson was unable to carry the day with his argument that "freedom of association in the labour relations context includes the freedom to participate in determining conditions of work through collective bargaining and the right to strike." Mr. Mulroney, who formerly earned his living by the practice of labour law, professes to respect picket lines and otherwise to support the rights of workers to organize, bargain and strike. Canada has indeed subscribed to International Labour Organization conventions which explicitly require respect for such rights.

We therefore call for the accord to be amended by defining freedom of association in section 2(d) of the charter as including the freedom to organize, bargain collectively and strike. Like all other charter rights, this would of course remain subject to section 1, permitting legislative curtailment where "demonstrably justifiable."

OPSEU has long campaigned to secure for our members the rights to full participation in the political process that are enjoyed by other Canadians. Members of this committee will be aware that Mr. Peterson's government pledged in May 1985, in another accord, to remove this long-standing injustice. You will also be aware that the law reform commission, to which the detailed consideration of the question was referred, reported positively as long as July 1986.

OPSEU hopes that provincial legislation action to confer political rights upon public servants will not much longer be delayed. But the slowness of the reform process in Ontario, together with the continued denial of such rights to federal civil servants and to our brothers and sisters in other provinces, argues for further constitutional adjustment. OPSEU is currently embarked on a court action to prove our contention that the charter does indeed confer full political rights on all our members as much as upon all other Canadians. But the foot-dragging we have experienced in this regard persuades us that explicit entrenchment of the right to participate in the political process in the Constitution is prudent. Accordingly, we suggest amending the accord to add a clear statement of that right to section 2(b) of the charter which protects freedom of expression.

OPSEU does not propose to offer a detailed analysis of the entire accord, but we feel that our interests as trade unionists and our concerns as Canadians with important aspects of national life require us to oppose several sections of the document. It is necessary to acknowledge at the outset that there is great uncertainty and disagreement respecting the actual meaning of many important provisions. The hurried and secretive process of negotiation evidently produced an agreement which is shot through with obscurity, inconsistency and ambiguity.

The wording of a constitution is no mere stylistic concern. Critics have warned of the uncertainty created by the ambiguity and inconsistency of its language on many key points. Accord supporters have often acknowledged the linguistic muddle with what Professor John Whyte, the dean of law at Queen's, has called "the vacuous observation that the effect of legal language is always hard to predict and that we shall have to see what the judges make of the provisions."

For us as trade unionists, that just is not good enough. When OPSEU negotiates collective agreements, we strive to make them clear and precise so as to clarify rights and obligations for all contingencies. Of course, it is sometimes necessary for the meaning of clause umpteen in a particular situation to be determined by an arbitrator. But no sensible person would sign a collective agreement in which fundamental issues are left for subsequent determination by a third party.

Confusion is rife, for example, in the accord's treatment of national shared-cost programs. As students of this important area of governmental interaction are aware, we have no coherent categorization of such programs and indeed no statutory definition to apply. Now we shall need to figure out what is meant by quite fundamental parts of this provision of the accord, as we argue below.

After his exhaustive analysis of this provision, Professor Schwartz sums up the confusion very well when he says: "There is no bottom line here. There is only a betting line." And you pays your money and takes your choice in respect of so much else in the accord, such as how far its terms will modify the rights of women and whether they will affect those of native peoples.

We certainly acknowledge that there is an important role for the courts in interpreting constitutional provisions but we cannot accept that it was necessary for so many key elements of the 1987 accord to end up, as it seems likely they will, in arbitration. As one observer has commented, Canada's Constitution is looking more and more like the Income Tax Act, and we all know it is not the ordinary taxpayer who benefits from such impenetrable complexity.

The equality rights contained in the Charter of Rights and Freedoms, which came into effect only in 1985, are seriously compromised by this accord. While OPSEU welcomes the achievement of a constitutional agreement endorsed by Quebec, we do not see that this gain needs to be won at the expense of the equality rights of important elements of Canadian society. We concede that the impact of this provision is open to argument, but when it comes to fundamental constitutional rights, OPSEU is adamantly against taking what former Senator Eugene Forsey terms "a leap in the dark."

The last-minute scramble to extend charter protections to some affected groups by providing that the accord does not derogate from the rights of native people or the multicultural community simply points up this defect. It is offensive to women and others whose equality rights are not so guaranteed for our Constitution to be distorted by a hierarchy of rights. OPSEU supports the Women's Legal Education and Action Fund and other women's groups in calling for the accord to be amended so as to state that nothing in any of its provisions affects any of our basic rights and freedoms under the charter.

Sexual equality rights have not yet been litigated extensively. They are already liable to restriction under section 1 of the charter, the "demonstrably justifiable" clause, and subject to suspension under section 33, the "notwithstanding" override. The courts have held some conflicting

legislation, for example, the Bill 30 decision upholding the extension of full provincial funding to the separate school system, to be immune from charter review. It is patently wrong for the first amendments to the Constitution which follow enactment of the charter to put at further risk the equality rights of women.

The Constitution currently contains protection in section 15(2) for programs of affirmative action to remedy the condition of disadvantaged groups. Yet such initiatives, which include equal pay for work of equal value and other forms of long-overdue employment equity, remain subject to the "notwithstanding" provision. OPSEU recognizes that emergency circumstances which could warrant the use of that means of overriding charter provisions might arise at some time in the future, but we are concerned that the accord may further limit, instead of broadening, the routine application of the Charter of Rights and Freedoms.

The accord's recognition that Canada is a country characterized by linguistic duality does not go far enough in acknowledging the realities of our country. We believe it is appropriate to state in section 2(1) of the accord that Canada is a multicultural society and also to declare that our aboriginal peoples constitute a fundamental characteristic of the country. While such declarations would not in themselves add to existing individual rights, they would powerfully add to our symbolic commitment to respecting the contribution of ethnic minorities and of the original inhabitants of our land.

Al Johnson, a distinguished public servant who has worked at the highest level in both federal and provincial levels of government, has concluded that the effect of the Meech Lake accord will be to make the government of Canada "powerless to take such initiatives" as medicare, financing of post-secondary education and even the Trans-Canada Highway. OPSEU has the gravest concern about the restriction of the federal spending power that is entailed by allowing provincial governments to opt out of any "national shared-cost program" in an area of exclusive provincial jurisdiction and to receive "reasonable compensation" provided that they launch "a program or initiative that is compatible with the national objectives."

The union movement has fought hard for national social programs like medicare. A national child care system is long overdue, as is a comprehensive accident and disability compensation scheme. The accord's restrictions on the federal spending power threaten to stop such new measures altogether, and many observers have suggested that they also threaten the continuation of existing programs if their future modification may be held to bring them under section 106A, hence allowing provinces to opt out and demand compensation.

1450

In OPSEU we have had some recent experience with opting out. We have been fighting the National Citizens' Coalition, which has financed court action by a nonunion college teacher, who is trying to escape paying the equivalent of union dues for many of the benefits he enjoys by virtue of union representation. Merv Lavigne and his financial backers have tried to use the Charter of Rights to enable dissident employees to opt out of their share of the cost of the many initiatives that their legal bargaining agent democratically decides to undertake in their interests, thus undermining the ability of the labour movement to play its traditional role in helping to define the economic, social and political directions this country will take.

Similarly, entrenching a provincial right to opt out from the

Constitution will undermine the framework of national programs that does so much to define us as Canadians. The right to compensation may render new or revised programs impossibly expensive for the government of Canada. Already, Ottawa has cut back sharply on its commitments to shared-cost initiatives under the Established Programs Financing Act.

Why in future would any federal government want to push for additional spending measures, when the services intended to benefit Canadians could, in province after province, be designed and put in place as initiatives of the provincial government, for which it would get the entire political credit while Ottawa was relegated to carrying the brunt of the financial can?

The loosely worded requirements respecting provincial alternatives--just one part of what Professor Schwartz calls "the boggling ambiguity" of section 106A--threaten a checkerboard Canada characterized by a diverse and incoherent array of government services. The wording of the accord in this area is bound to give rise to federal-provincial disputes over the meaning and legitimacy of "national objectives," whether a provincial "program or initiative" is "compatible" with its federal counterpart and over the justification for and scale of "reasonable compensation." It is clear that crucial issues respecting government programs will as a result be determined by the courts, rather than by our elected representatives.

OPSEU condemns, in particular, the accord's failure to guarantee the public character of the fundamental programs for which Canadians pay through their taxes. We are fully familiar with the disposition of provincial governments to contract out and privatize services to people. We fear that the national child care system will have an unacceptable level of for-profit provision as section 106A is now phrased, even if the current federal government and its pandering to the private sector are alike removed by the outcome of the next general election.

OPSEU has hundreds of members who work in private child care centres; they know the price paid, in poor wages and deficient programs, by the teachers and children who work in the for-profit sector. OPSEU also supports the National Anti-Poverty Organization in its insistence that the poor Canadians whose meagre levels of support are sustained by the cost sharing of the Canada assistance plan should not be put at risk by any undermining of that program.

OPSEU therefore calls for the accord to be amended so as to establish reasonable federal limits on provincial expenditures of shared-cost funds. The criteria set out in the Canada Health Act should secure the Canadian public interest, provided the Parliament of Canada is explicitly empowered to set national standards for the shared-cost programs offered by provincial governments.

I would now like to call on brother Larry Brown from the national union to proceed.

Mr. Brown: Our organization is very concerned at the influence that this charter and this accord grant to the provinces with respect to important national institutions, such as the Supreme Court of Canada and the Senate.

I think it is unarguable at this point in our history that the Supreme Court has crucial responsibilities in the interpretation of the Constitution, and the presentation we have been making to you indicates that those responsibilities are going to grow and not shrink, as the ambiguities in this

accord will put more and more of a crucial role on the Supreme Court for determining the future direction of this country.

That court requires judges who are of the highest calibre both in terms of their competence and in terms of their distance from the partisan political process. They must take a truly national view of the issues that they have to decide on. I think the accord very seriously puts in jeopardy that kind of national calibre of a Supreme Court. Members of this committee will understand the union's objection when employers of any stripe contract out their work. To some very disturbing degree, the federal government has contracted out the appointment of Supreme Court judges under the accord. The parallel may not be exact, but there is a disturbing allocation of responsibility to the provincial level.

It may be that some provinces can help to rectify some of the damage done by that by making sure that the appointment at a provincial level is done with some public scrutiny and with some public input, as the Attorney General (Mr. Scott) has suggested. But that hardly remedies the situation in nine other provinces. The experience in those provinces and the experience of the process of appointing judges by and large indicates that there is already far too much patronage involved in the appointment of judges. We are in danger of seeing now far too much ??agency involved, where provinces will appoint to the Supreme Court only those people who are prepared to take forward the province's position.

One very disturbing current example of that current has to do with the most recent very public decision of the Supreme Court on the question of Canada's abortion law. The Supreme Court struck down the abortion law; it said in a very compelling decision that the abortion law in Canada was not valid. We have a Premier in British Columbia who is deciding unilaterally that he is going to determine what the law with respect to abortion should be and that he is prepared to override the Supreme Court of Canada.

That is a problem for the people of BC to deal with but, in the meantime, we are looking at a situation where the Supreme Court making determinations on such fundamental matters is now going to be put in the hands of people like Mr. Vander Zalm, who has clearly indicated already that he is prepared to flaunt the law of the land in order to get his personal opinions upheld.

I do not think it is a flight of fancy to suggest that under the new Meech Lake accord provisions people like Mr. Vander Zalm are entirely capable of ensuring that the Supreme Court is loaded with people who share their particular religious or moral persuasions so that they can be assured that decisions like that do not happen again in the future. That is not something that should be tolerable to the people of Canada.

We do not ascribe comparable significance to the Senate, quite clearly, but we do deplore the federal concession to the provinces allowing the provinces to nominate senators. One of the reasons that we deplore that, quite frankly, is that it seems to us it is almost certainly going to prevent real Senate reform in the future, because you now have 10 premiers who have been given access to a place where they can nominate people who have served their political party well, which is basically what the Senate serves as.

That right has been spread out to 10 people, all of whom must now agree unanimously to amend the system. That is asking a tremendous amount of human nature. To ask that 11 first ministers are going to gather in a room and all

of them equally give up their right to appoint senators, some of them toying with that power for the first time, is asking an incredible amount of human nature, and I do not think it is practical.

What we are now going to see under the combination of the provinces' right to appoint senators and the provinces' right to veto any change is the Senate in perpetuity. Any chance of meaningful reform of the Senate has basically gone by the board with the Meech Lake accord.

We are dismayed and disquieted by the role assumed by first ministers' conferences. We are not dismayed by first ministers' conferences per se but we are dismayed when they are incorporated into the Constitution of Canada and given a formal role to play in governing our country, because 11 heads of government meeting together in a forum that is not accountable to determine where our economy is going is basically undemocratic. The results of those decisions are not then held up to anybody's scrutiny.

It is very easy for any individual member of a committee not to have any part in a decision made by a committee. The Prime Minister can go back and, if the decision is unpopular, can blame it on the premiers and any individual Premier can blame it on everybody else because it is a collective decision-making process not accountable to anybody. There is no direct accountability process.

1500

Your role in the process, as being able to question your first minister, will be in effect nullified, because you will be unable to question him about a decision that 10 other people made.

It is an unaccountable system that has now been put into place with no parliament, no Legislature to answer to with respect to governing a matter like our economy.

On immigration, we are concerned that the end result of the Meech Lake accord could very well be 10 different immigration patterns in our country; 10 different provinces negotiating the right to control immigration into their province. At some point, one has to question what role will be left for the federal government if immigration is in fact to be negotiated with every individual province.

Surely one element of national being is the question of how your country will grow, who will be allowed to immigrate and so on. That power, under the Meech Lake accord, is given to Quebec, guaranteed in perpetuity to Quebec, and offered to any other province that wants to take the federal government up on its offer. Even if only some of the provinces do, instead of one system of immigration to Canada, we will have several. That is surely a very dangerous matter for our national entity.

It is clear that the process of arriving at the Meech Lake accord was one of power brokers sitting at the table and trading their power back and forth, because the territories have been frozen out. They were not there, they were not represented. Their power brokers were not there to trade the bargaining chips and as a result they have been frozen out of the process, both of amending the Constitution and of nominating people to the Supreme Court and to the Senate.

The provinces have a veto over whether or not new provinces can be

created in the territories, so not only have they been frozen out, but somebody else has been given an exclusive right to determine whether they will ever enter the club. It is outrageous that provinces would enjoy that kind of veto over the admission of new provinces into the Canadian Confederation.

It is interesting that the joint committee of the Commons and the Senate at the national level agreed that was an unfortunate result of the Meech Lake accord, but instead of recommending that it be fixed, said that at some point in the future that obvious error should be corrected. That is a very strange way to approach a problem, to say, "Yes, there is a serious mistake made here; therefore, we think you should go ahead and implement it and fix it at some point in the future." Quite frankly, that is not the way we operate and we do not know why anybody else would.

Finally, the process of dealing with aboriginal rights under the Constitution is very unsatisfactory, because the first ministers' agendas are set in the Constitution--a very difficult document to change--and the agenda for those first ministers' conferences to deal with ongoing items of constitutional reform include such matters as the Senate, which we have already determined will be basically wasted discussions, because unanimity will be virtually impossible to come by, and fisheries.

No disrespect to fisheries as an important item for national debate, but surely it is no less important to discuss the future role of the aboriginal people of Canada at those first ministers' conferences. Fish have been guaranteed their rights; aboriginal people have not.

Mr. Clancy: The Ontario Public Service Employees Union, NUPGE component, deplores the process by which the Meech Lake accord was developed. It calls for the strengthening of the Charter of Rights and Freedoms; condemns the accord's obscurity and uncertainty; opposes its adverse impact on equality rights; rejects its undermining of the federal spending power; regrets its negative impact on national institutions; and objects to the accord's modification of the constitutional amending formula, as well as to its treatment of the territories and the rights of native people.

Accordingly, we urge the select committee to reject the motion to ratify the Meech Lake accord. Instead, we call upon you to propose its renegotiation to rectify the serious deficiencies which have been outlined in this brief. Mr. Mulroney has said there is no room for amendments and Mr. Peterson has taken a similar stance. We believe it is your responsibility as legislators to reject the view that we cannot do better than the Meech Lake accord by returning a negative recommendation on its package of retrograde constitutional changes.

Mr. Chairman, I have one final question for you. Having appeared before you and made our presentation, what assurances can you provide us that what we have had to offer in this constitutional debate will have any opportunity for real and meaningful input for change into the process in regard to this Meech Lake accord? Having spent the time with members of my union, the national union, I have a real interest in knowing from you whether we really have an opportunity to make change here through this committee of which you are the chairman.

All of this is respectfully submitted and we thank you for the opportunity of appearing before you today.

Mr. Chairman: I suppose in a sense the only answer, ultimately,

would be in the nature of our report and what happens to that report. I do think we are all elected members of three different parties whom I hope have some sense of integrity and view this as a tremendously important task we have been asked to do. I think we have all said at different times during these hearings that none of us would ever want to go through this again in the context within which we have been given this job at the present time.

That being said, that is there. We all know what different people did back in April and June, but, as a committee, our responsibility is to the Legislature and we are going to listen to you and to everyone else who has come before us and try to put forward what I hope will be as honest and frank a report as we can.

I think one of the things we have discovered to this point that has been tremendously important--and I say this with no disrespect meant to our colleagues in Ottawa--is that in terms of the number of presentations that have been made and will be made to us, such as today, and in terms of the number of written presentations made to us, we will be providing a forum in which there will be a great deal more public education and discussion of these issues, which certainly was not there in the process leading up to the accord. I think that is awfully important.

We are part of that process. As you are aware, Manitoba and New Brunswick have said that they, too, are going to be having committees. The Senate of Canada is currently looking at the issue as well. I am a great believer in ideas and time. I think we have room for both. Where that is all going to lead us, I do not know and I am not trying to mislead you and say that you have come to the right place and tomorrow we will have all the answers, but I am most appreciative, and I know the committee is too, that you did take the time to develop the ideas you developed and to bring them before us. We will try to deal with them as honestly as we can.

Mr. Clancy: If I can make one quick comment following your remarks, I appreciate your thanks in regard to our presentation, but to be very frank with you, in making a decision whether to appear before this committee or not, I spoke to a number of my constituents, union members, and what they were relaying to me was there was a real sense of frustration or hopelessness because they felt that the committee, dominated by the government members, the government members themselves would be ordered to follow a caucus line and the Premier has already established that, if you will, by saying that it cannot be altered.

I persevered and was able to persuade them that it was still important for us to appear before the committee, but I wanted to relay to you the frustration that some of my members feel, citizens of this province and constituents of this government. In approaching this task, they felt it was really a foregone conclusion that the government would by dominating the committee would insist that the party line would have to be followed.

That was really the reason I posed that question.

Mr. Chairman: I appreciate that and I think that is certainly fair comment. The only thing I would say, in terms of my colleagues from the government side, is that what we have insisted upon doing in this committee is listening openly and frankly, and whatever somebody else who is not a member of this committee has said is interesting but that is not what we are doing here.

Clearly, after this is all over and we sit down and try to determine what it is we are going to do, we will have I am sure some fascinating and interesting discussions, but I am glad you persevered and brought these views to us. I can assure you we will deal with them and if we do not, we have colleagues from the other two parties who will certainly bring that to our--

Mr. Clancy: So I take it those members of my union who spoke to me in those terms are incorrect in their assumption that the Liberal members of this committee have been ordered to--

Mr. Chairman: We have not been ordered to do anything.

Mr. Clancy: I appreciate your frankness.

1510

Mr. Breaugh: I think a couple of things need to get put on the record.

You have mentioned repeatedly in your presentation today--and I wish you had been at Meech Lake; we might be able to understand this other accord a little better if you had participated in the writing--you did talk about the process a lot. If nothing else comes from our deliberations, somewhere we must put an end to the process we just saw. If that process were allowed to stand, if the concept were embedded that it is acceptable to the people of Canada that 11 men, no matter what their elected position, are legally empowered to go away to the cottage for the weekend with a case of Blue under each arm and rewrite the Constitution of the country and no one else is allowed to say anything about it, we are in deep and dire trouble. There are those of us who contend that we are in deep and dire trouble anyway, but I do think that point really has to be made.

Let me pursue a couple of other areas that we seem to be sidetracked on. There are a number of groups coming before us--and you have made reference to this too, so I think we have to deal with it--kind of urging the committee to move an amendment. I have been attracted by several amendments that have been proposed, particularly ones put forward yesterday by Tony Penikett from the Yukon.

The problem with that is, if there ever was a morass in Canadian political history, imagine what will happen when 12 legislatures all start wending their way towards amendments to this process. Each of the 2,000 or 3,000 people who are involved will have to agree with each and every word of each and every amendment that is put. Given the parliamentary skills located in those chambers, the number of occasions when they could not put the question, talk it out for the afternoon, word it in a different way, insert a comma, it could be well into the third century after this one before anything was done.

There are several areas where people need clarification, where we need to refer matters to get a Supreme Court opinion. We have seen proposals where people said, "We do not like the way this is worded, but if we had a better understanding of what was really meant here or how it would be implemented, perhaps it would be acceptable." I am just wondering whether you would give us your opinion on whether that would be a useful avenue for us to at least explore.

There may be ways where we can clarify it. Again, a number of groups

before us have really said: "We do not know what this means. If somebody could clarify it for us, that will make the critical difference whether we think this is a good idea or a bad one." There are some ways that have been suggested where this committee could in fact do just that. Is it worth while pursuing it?

Mr. Clancy: Before I call on my colleague from the national union, the first point is we spoke to the ambiguities and I could not agree with you more. There has to be a way of determining what those mean now. It makes sense from a very practical viewpoint.

In addition to that, we are saying that we urge this committee to reject the motion, because aside from the ambiguities, we see some other real deficiencies in it. It seems to me if there is the will--this is a very serious issue, an important issue to the country--then this government and other government across this country and indeed the federal government can come together, perhaps taking into account what each of these committees has heard across the country, committees in those provinces that set it up similar to what we are doing here in Ontario. Let us pull people together in fairly short order.

There are a number of inadequacies that people are pointing out, regardless of whether you are in British Columbia, Prince Edward Island or Newfoundland. There are clearly some real failings in this accord.

Mr. Brown: I wonder if I could just add a word.

First of all, granted there may be some difficulty with the amending process, but the worst amending process that we could come up with would at least be an open process and therefore better than what we have had so far. I am a little bit frustrated, quite frankly, with somebody saying: "We have boxed you into a corner here. The accord, granted, may be bad, but we cannot think of a way to fix it so therefore we have to stay with what we have." That frustrates me. I do not like those kinds of solutions.

With respect to the ambiguities, that is an interesting point you raised, but I have two concerns about what you say on that. The first is, who are you going to ask? The accord in many places is not ambiguous according to the drafters. They all have a very clear idea of what it was they meant to say. The difficulty for those of us who were not in the room is that they disagree with each other.

The province of Quebec, for example, is very clear on what its power now is with respect to federal cost-shared programs. It is not the same understanding the federal government has. I have seen markedly divergent views on what the immigration powers are between different governments that all participated in the process. Who are you going to ask?

The language is not unclear by accident. The language is unclear by design. It is a very fragile accord that we have here. Those parties can only continue to agree with each other in so far as they continue to misunderstand what the other party meant. The ambiguity is clearly, I think, by the admission of the Prime Minister at one point, a design feature.

While we can appreciate that, it is, quite frankly, a nonsensical way to negotiate a Constitution. If there is not any better agreement than that, then we do not have one.

Mr. Breaugh: If I could just conclude with one quick one, at the heart of what we have to decide are--a lot of what has been discussed so far even in these committee hearings--intentions. We have no way of knowing intentions because we are not privy to the discussions. I guess it is a judgement call.

If our judgement call is that this process is so foul that it would be folly to pursue it any further, we should just say: "No. To hell with the whole process. We want nothing to do with it." That is one way to deal with it. If we are not clear at the end of our hearings that--there may have been good intentions and there is an opportunity for us to clarify a situation and to rectify it--somebody who raised legitimate concerns now no longer has to face those concerns, and we make the valid judgement call that as a package, is this good or bad, is it something you can salvage, I think it is difficult for us to do that.

Part of our problem is that if there were 10 committees and committees in two of our territories functioning as we are and we were looking at two years from now to put all of these words on the table, to gather up the consensus, then it would not bother me if the 11 wisest people in the country went to Meech Lake for a weekend. It would not bother me at all because they would be going there with all of this material in their briefing books, all the recommendations from legislative committees. The problem I have is that this one is going the other way around, and we are precisely backwards to the way we should be functioning.

Mr. Clancy: But if it takes two years, so be it. It is worth it.

Mr. Breaugh: Yes.

Mr. Clancy: I argue that if there is the political will, if this federal government along with the provincial governments said, "OK. It is March 1988 and we want this process finished by December 1988," do you think they could not do it? They can do all sorts of things when they put their minds to it. So you would go back out, hold hearings like this, with due public notice, follow a very public process, invite people out and then collect the submissions and pull that together. It can be done.

Mr. Breaugh: OK. Thank you.

Mr. Offer: Your last comment was actually the answer to the question that I was going to ask. He must have known I was going to come up with this question.

Mr. Chairman: We are doing everything backwards here.

Mr. Offer: That is right.

In your concluding remarks, you have indicated you are concerned with the process, and I know that is putting it lightly, from your position. Your next point was calling for the strengthening of the Charter of Rights and Freedoms. The question I ask is, that second recommendation, of necessity, calls into play a response to your first concern with respect to process. In other words, if you are calling for the strengthening of the Charter of Rights and Freedoms, how are you doing so in terms of process? I was wondering whether you might share with us how, maybe not with respect to the Charter of Rights and Freedoms being achieved, but how indeed the process with respect to constitutional reform can be improved, from your position.

Mr. Clancy: Starting with forums like this, public debate. I do not want to belabour the point or repeat it, but they went away, cooked the deal and came out and said: "Here it is and, by the way, you cannot change it." This is the Constitution, the supreme document that is governing the lives of not only the Canadians of today but also the Canadians of the future. They go away and cook the deal.

The first thing is public debate. You listen to what people are saying. It is their document. If you expect people to follow it, to uphold it, to embrace it and, indeed, to cherish it, you had better give them some input into the development of it. The process is skewed and it has to be rectified. That is the job of this committee, to do what is in its power to ensure that happens so that the weaknesses are corrected. I could go all through what the weaknesses are, in our estimation, and I am sure that others will come before you and point out other deficiencies.

1520

Mr. Offer: We have heard, of course, some concerns with respect to the process and that is what we are going to address ourselves to.

Mr. Clancy: It is pretty simple. Either you as a government here in Ontario accept some of the criticisms that are pointed out--and there are serious deficiencies in it--either you have the courage to take it on, challenge the process and ensure that it amended, or you do not. It is really that simple.

Mr. Offer: But in dealing with the process, what we have to do, what we should do and ought to do, I think we on this committee are going to try to address our minds to that issue by asking you and delegations such as yours that have come forward and taken the time and the effort to discuss that process to go that one step further and say, "Listen, yes, we have concerns with the process," and share with us from your perspective how that process with respect to constitutional change can be improved.

I thank you for taking that time and effort today. I think the points that you made with respect to the whole public process and the public hearings are things that we are going to have to, ought to and in many ways look forward to deliberating. I think a lot of people are waiting to hear that.

Mr. Brown: I suspect that if people found they had a government--and then had a vote afterwards, they would be a little bit perplexed by the process. In effect, that is what we have got. We found out that we got a new government and now we are getting the vote, but we have already been told that it is irrelevant because the government is already in power. It is a fundamentally undemocratic process and it cannot work. If everything appeared to be fine, it still could not work. You could not allow it to happen.

Mr. Clancy: It is like building a bridge, the causeway from Prince Edward Island to the mainland. You build it and then go and ask the people if they want it. Guess what? People are frustrated, there is a sense of hopelessness, and they say, "What is the point of voting?"

Mr. Chairman: I have Mr. Sterling and Mr. Allen, and I am mindful of the clock.

Mr. Sterling: I would like to thank you for your well-thought-out brief on this particular matter. I think your question at the end is really a

very important one in criticizing a process which took place, and my colleagues and I, particularly in the opposition, are having to participate in a process which may exacerbate a bad situation. The submissions to this committee that I have heard so far have been really quite excellent, well thought out and well put forward.

I can only say, in terms of my experience over the last three or four months since this government was elected, that we have referred to a committee the free trade issue, which had already been decided in the Legislature, regardless of which side of the issue you were on, what the position of the Legislature is. Then they asked a committee to hear people talk about it.

Two or three weeks ago, I sat on a committee dealing with conflict of interest in terms of how this Legislature should run. The Attorney General came in and said, "We want to listen to you," but accepted no major recommendations at all for that particular bill. Both opposition parties have to vote against a piece of legislation which really runs this place, and I think it is a very weak way to have a conflict-of-interest bill go ahead.

Then there is this particular matter, which was only put in front of the committee at the urging of the opposition parties. In fact, there were not going to be any hearings originally. Mind you, we may not have urged that if we had known the conditions we were going to get it under. I have some real concern about what this committee is doing from day to day in terms of calling people in front of it under, perhaps, the charade that something is going to happen.

Mr. Clancy: Mr. Sterling, I am sure you have got lots of important work to do rather than sit here, just as we do. We have contracts, we have laid-off workers to defend and so forth. Ironically, we sit here and criticize the first ministers for secreting themselves away and making deals. If they called my union and said, "Will you get on a plane and come down here and talk to us about the charter?" and if on the same call they said to me, "But we want to tell you, you cannot change our mind, it is already made up"--guess what? I would not go.

By analogy, why would I come before this legislative committee, if it is foregone? That is what concerned me. In our brief, we talked about Premier Peterson's statement that you cannot change it. That is why I was prefacing those remarks or my summations tabling those remarks with the chair. We have a deep and abiding interest in this issue and we want to see changes.

Mr. Sterling: The other part that I would like to ask a question about is in terms of carrying on the free trade debate. There is a lot of opinion associated with the free trade agreement because people cannot predict what might happen with as great certainty as they can with this particular change in the way we are doing things in Canada. I think it is easier to look at the accord and say: "These are the negatives. Here are the positives." There we are dealing with economics, we are dealing with projections and all those things. It is unusual to get two economists to say the same thing regardless of what position they might take.

In this one, in terms of what I have heard from people, from your group and from other groups, there are a tremendous number of negatives, and I am not hearing the positives. One positive is bringing in Quebec in a symbolic manner. Even the Premier of this province admits that Quebec is legally part of Canada anyway and has been since 1982. It is a symbolic measure. You are involved in negotiations all the time. Do you think that symbolic tradeoff is worth the negatives that everybody has seen in this particular package?

Mr. Clancy: Not at all, comparing today in 1988 with 1968 in terms of Quebec and the "quiet revolution." I think it has changed dramatically this country's attitudes towards Quebec francophones and vice versa. The symbolism, while important, is not worth the baggage that it has brought along with it, the negatives that impact on the charter. I think we can still achieve the former, that is, bringing in Quebec but, at the same time, we can assure other Canadians who are disenfranchised by this process that their concerns are heard and taken care of.

Just as a quick word on that, we should be very careful not to make the mistake that Mr. Bourassa is Quebec any more than Mr. Peterson is all of Ontario. There are a lot of people, including people we represent in Quebec, who have no more time for the Meech Lake accord than we do. When we say, "We brought Quebec in," we should be careful to distinguish. We brought Mr. Bourassa's government in, and not necessarily with the greatest goodwill of all the people of Quebec. They see this as not being something in their interest either, for different reasons perhaps, but that does not change the fact.

Mr. Allen: Thank you for a very trenchant and toughly argued brief, which makes a number of very good points. I think it is quite helpful to us. I am not sure I agree with you, with all due respect, that it is possible to draft a constitution with the clarity of a collective agreement. The terms of reference, the players involved and the issues are of such a scale that in order to achieve some modus vivendi, some basis of continuing to live together in a very large establishment like a nation, you are into tradeoffs that simply have to be settled over time. I really doubt that one can provide that degree of clarity at all points.

I need a little clarification from you, however, on the business of spending power and provincial opting out. I thought as you started working into that, you were principally concerned about weakening federal spending power and the capacity to field social programs per se. Then as I read a little further, I saw you checking off both provincial and federal ends of the game in terms of their inadequacies in delivering what were acceptable social programs, from your point of view, through the shared-cost mechanism.

You tick off both sectors, both levels of government, for example, for being prepared now to follow the privatization route under the day care stuff. I was not quite sure whether it was both messages or whether you were principally concerned about some content that needs to be put into the phrasing of objectives or whether it was principally the weakening of federal spending power and the fracturing of federal programing.

Mr. Clancy: Mr. Allen, both contentions are valid, the one being that the federal government does not have the same incentives to transfer funds. Perhaps it does not want those incentives when they are not clearly identified with the resultant dispersement of those funds to the people within the province. Likewise, provinces will have the opportunity to opt out of commitments that heretofore have been fairly uniform across the country. That is the concern we have. The concern is exacerbated by the attitude of some provincial governments towards the funding of social programs and health care programs, indeed, even educational programs.

We felt that the criteria set out in the Canada Health Act were the criteria we should be upholding, thereby locking both the federal government and the provincial governments into uniform programs across the country. We are very concerned about the development of privatization, contracting out,

particularly of social services, the for-profit motivation in health services and social services in particular, the manifestation of that in places like British Columbia and Saskatchewan and the consequences of that.

1530

We are also concerned that, as part and parcel of this manifestation of so-called Thatcherism, Reaganism, Mulroneyism, neoconservatism, whatever it is called, the free trade agreement will also tend to lock us into positions which will make it far easier for the federal government than the provincial governments not to be involved in those social programs. We think that would be a sad day for Canada.

Mr. Allen: I certainly like the latter emphasis. For want of the kinds of terms relating to finding the national objectives of shared-cost programs, the issue of whether a province has a right to opt out or whether it can devise its own program as distinct from a federal program is not necessarily a bad thing, if you imagine a federal government that was putting very low level demands on the provinces and provinces wanted to opt out and construct more progressive and adequate social programs, knowing that some of the social programs we have, such as medicare, did begin at provincial bases.

There are provinces around that are more progressive than some of the federal governments I can think of, including this one. But I rather like your way of solving that problem by setting some basic criteria that define the overall parameters and objectives of the national standards, to keep both levels of government on a progressive track in the delivery of social programs.

Mr. Usher: With respect, Mr. Allen, the emphasis is rather on the withdrawal from those services and the opportunity to withdraw from them rather than to add to them. I do not think there is anything in the accord that would be detrimental in that effect, that the province could provide whatever services they felt reasonable, given the political will, of course.

Mr. Allen: But to be able to use federal money to do so is another question. If you want to top up your own program and use the federal money to do so, that should be there. That is opting out, but of a progressive and positive kind.

Mr. Chairman: I want to thank you very much for taking the time, for persevering and for developing your brief. I hope when this whole exercise is over, you will feel that it was worth while and that it led to something. We very much appreciate the time you took and the various views and points you put forward. Again, thanks very much.

I will ask Chief Gordon Peters and the representatives of the Chiefs of Ontario to come forward.

I also want to say to the representatives of the Congress of Black Women of Canada, do not despair, we are going to get there. I am sorry that we are running a bit behind, but we will certainly be here to hear everyone who came this afternoon.

Chief Peters, we are delighted that you could join us today. I wonder if I might ask you to introduce your colleagues and then proceed as you wish. Upon the completion of your remarks, I know we will have some questions to put to you and your colleagues.

CHIEFS OF ONTARIO

Chief Peters: Thank you, Mr. Chairman. On my left is Grand Chief Joe Miskokomon of the Anishinabek and on my right is Shin Imai, one of the legal counsel of the Chiefs of Ontario.

What we would like to do, first of all, is to read the prepared statement we have dealing with the concerns we have. It is important for us to point out clearly before we start that we have empathy with the New Democratic Party and the Conservative members of this committee when they talk about the frustrations they have in dealing with the fact that they are now concerned with an issue that has already been almost been resolved. I think that you will now understand how we feel as Indian people and know the frustrations we feel. This is an everyday occurrence for us in dealing with issues that are already settled as a matter of fact before we deal with them.

Mr. Chairman: I hope that sense of empathy and sympathy extends to the Liberal members as well. We, too, are frustrated by this.

Chief Peters: I would like to say that but, unfortunately, I will wait until I see what recommendations come from the committee.

To begin with, I would like to thank you for the opportunity to make this presentation this afternoon and to bring forward the concerns that we have as first nations regarding the Meech Lake accord. There are over 130 first nations in Ontario and our people number over 100,000. It is very important that you understand that we are many people, not one group of people.

We have different languages, different cultures, different traditions and laws that are still very much intact. Since long before the settlers came to our country, these crucial elements of society have provided the basis from which our nations have handled their own affairs. Yet the federal and provincial governments have persisted in dealing with us as one social entity, as one ethnic group of people, without regard for us as distinct and separate nations.

Our nations have always had their own lands in this country, always. We did not come here from somewhere else; we have always been here. When the settlers came here, we made treaties with their governments, as nations to nations. We have honoured these treaties. We agreed to share portions of our lands so that you could live and survive here and we agreed to share our resources with you. But we have yet to see the benefits of the vast resource revenues that have been reaped from our lands. The governments of Canada have failed to honour our treaties. We must have a constitutional commitment guaranteeing that our treaty rights will be implemented in accordance with the spirit and intent of the treaties.

This is a large province. There are 450,000 square miles of land of which 87 per cent is provincial crown land and less than one per cent federal crown land. Within those federal crown lands, first nations occupy 0.6 per cent of the land of this province. We are talking about approximately 2,700 square miles of land on which we live, but not enough on which to survive and evolve.

This is a wealthy country and a wealthy province built on the resource development of our lands. Some people have said that we are a tax burden, but they do not take into account that we have contributed and continue to contribute to this country in terms of land, resources, manpower and taxes.

They do not take into account that moneys appropriated by parliament for first nations are almost totally taken up by non-Indian bureaucracies, such as Indian Affairs with over 5,000 employees.

All we want is our fair share of land and resource development revenues in Canada. That would be a tremendous benefit to the Canadian public as we become even more productive and once again become truly self-sufficient and further contribute to the growth and development of this country.

1540

We are looking to regain our political, social, cultural and economic self-sufficiency. This requires that there be a true and explicit recognition of our rights as first nations to govern ourselves, to be self-determining. These are identifiable characteristics of a people, and we have been struggling to achieve this recognition through five years of constitutional discussions.

Instead, the Meech Lake accord and the Langevin agreement, reached in days, gave recognition of undefined rights to another people but not to first nations. It would have been easy to include aboriginal rights in the agreement without jeopardizing the accord had the political will been there.

The drafters of the Meech Lake accord did a good job in appeasing Quebec and the other nine provinces, but they failed to deal with the original people of this land when dividing up the powers of this great nation. Because of this injustice, first nations have five major concerns with the agreement they struck.

1. A weakened federal power. First nations have a direct link to the federal crown. There has been a shift from the federal government to the provinces, and this concerns us. In natural resources, for example, we have not been well served when we have had to confront narrow provincial interests in resources. With the provision to have the Supreme Court of Canada filled with provincial nominees, we are concerned that our interests will take a back seat.

Also, with the opting-out clause on national cost-shared programs, it is likely that it will be more difficult for first nations to have control over programs which may come under provincial control.

2. The unanimity requirement for new provinces. Some aboriginal people in the north aspire to provincial status. Their road to greater independence is made more difficult by the requirement that every single province must consent to the creation of a new province. The people of the north and all aboriginal people must have the power to decide on their political status.

3. No aboriginal participation at future first ministers' conferences. We must have participation in first ministers' conferences on matters that directly affect us.

At the present time, we are attempting to get explicit constitutional recognition of our right to self-government. Until that is done, we must have an opportunity to protect ourselves from the decisions made by provincial and federal governments that are detrimental to our rights.

Fisheries, for example, are vital to us, and it is totally unacceptable that the federal and provincial governments would discuss dividing up the jurisdiction over fisheries without including us in the discussions.

4. Recognition of first nations as distinct societies. We have no problem with the inclusion of Quebec in the Constitution, but to categorize Quebec as a distinct society and to leave out any mention of aboriginal peoples is to ignore the first societies of this land. We were shocked that the first ministers agreed to recognize Quebec as a distinct society. It is a vague and undefined term.

In our meetings with the first ministers, they constantly told us that it was impossible to recognize the vague and undefined right of self-government. "Define, then sign," we were told over and over again by predisposed premiers. Obviously, different rules apply when they deal with one of their own.

5. Future first ministers' conferences on aboriginal constitutional matters. The first ministers' conference in March 1987 was the last formally scheduled first ministers' conference on aboriginal constitutional matters. No agreement was reached. No future meetings have been scheduled. The Meech Lake accord is silent on future aboriginal and treaty rights conferences.

We are again faced with the attitude that if aboriginal peoples are ignored, they will cease to exist. The fact is, first nations will never disappear, and you will have no choice but to deal with us.

The federal joint committee recommended that a first ministers' conference be held before 1990, and we would like to have that constitutionally guaranteed.

The impact of attempted colonialism on our nations over the past four centuries has been significant and severe. The changes we are seeking to the accord and to the Constitution will begin the reversal of those impacts and support the growth and development of our self-determination and self-sufficiency.

There are those who feel that the recognition and implementation of our rights will have an impact on the non-Indian public, the non-first-nation communities. They are right. There will be an impact. But they should have no fear. They will not be dispossessed of their homes or their lands. Their lives will not be violently disrupted as ours were. They will not be restricted to small parcels of land. But they will have to respect our rights and our jurisdiction over our lands, our resources and our people.

The federal and provincial governments can expect a reasonable amount of backlash as this process of implementation proceeds, and they may have to pay for some mitigation measures. But this is nothing new or precedent-setting. Time and again, when companies shut down our mines close, it is the federal and provincial governments that pay the retraining and rehabilitation costs as part of their mitigation packages.

We cannot be told to trust and wait any longer to seriously address these concerns. If the federal and provincial governments continue to ignore our rights, the situation will only grow more tense.

As an example of what I mean, last September, people from Kettle Point on Lake Huron were prevented from fishing for food in their designated waters. They were confronted by armed enforcement officers and arrested. The fishermen were exercising their treaty rights, and yet this violent enforcement activity came very close to resulting in a fatality.

This experience shows why we need to have a clear constitutional

resolution on our rights. There is a great deal of ambiguity about the extent to which our rights are recognized, and this ambiguity leads to some very ugly situations.

Also, last September in James Bay, for no apparent reason, the Royal Canadian Mounted Police stormed in and began laying charges and harassing our people engaged in their traditional goose hunt. The chiefs and leaders were so angry that they threatened to go out into the bay and confront the RCMP directly. Again, this type of brutal intrusion into a first nation community can only result in more mistrust and potential confrontation.

These are two recent examples within the past year in Ontario. We could also mention situations like Lubicon, low-level flying in Labrador and the Bear Island Temagami case in Ontario.

These actions are consistent with recent magazine articles that say our cultures are irrelevant, that our way of life is archaic and repeat an argument that ancient societies should have been allowed to die. This is cultural genocide.

We believe in evolution and change. Throughout history, our nations have continually evolved and adapted, but always in accordance with our values and principles. That has been the key to our survival.

We have evolved and will continue to evolve, and we expect that Canada, and Ontario as a part of this evolving country, would develop and promote a change in attitude towards us as the aboriginal people of this land.

In order to do this, they have to stop kidding themselves that there is an Indian problem to be solved.

In 1920, Duncan Campbell Scott, then deputy superintendent of Indian affairs, articulated the policy clearly when he said:

"I want to get rid of the Indian problem... Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there's no Indian question and no Indian department."

This was the thinking of 1920, but it has become clear to us that not much has changed in 1988.

In 1948, there was a paper that was written that proposed the "liquidation of the Indian problem in 25 years" in Canada. Before that time period had run out, then Prime Minister Pierre Trudeau released a 1969 white paper, which again tried to institute a policy of total assimilation.

Next came the debates on the patriation of the Constitution. There was no mention of first nations in the Constitution, but we fought our way into recognition in 1981. Then a secret deal was made and we were dropped from the Constitution.

With the support of the Canadian public, we fought our way back in again, and the federal and provincial governments were publicly required to recognize our treaty and aboriginal rights in the Canada act that was passed in 1982. Unfortunately, those governments did not follow through on the wishes of first nations and the Canadian people.

Through four first ministers' conferences, we have fought to have our

rights clarified. But the federal and provincial governments could only see ways to limit and restrict the exercise of our Indian sovereignty.

The last formally scheduled first ministers' conference on aboriginal constitutional matters was in March 1987. It ended with no agreement. A month later, the Meech Lake accord was struck, and we were left out again.

The political leaders in this province have the opportunity to direct and be a part of the major evolution of their governments. They have shown their ability to recognize the good and the bad of their governments.

Premier Peterson recognized that free trade would be detrimental to Ontario and is actively seeking changes to the agreement. He also recognized that there were other constitutional issues that could be detrimental to the people of Ontario and built those concerns into the Meech Lake accord to protect his citizens. Now we seek the same kind of commitment and constitutional changes to protect our rights in the same manner.

Our survival depends on the recognition of our laws, which are different from yours, and the recognition that your laws may apply differently to us. There must be such recognition in the Constitution, which is your highest law of the land.

There is something that you, the committee, can do. You can recommend that the Ontario Legislature pass a resolution to amend the accord to meet our concerns. We hope that you have the courage and the vision to do that.

We also hope that the elected politicians of the province of Ontario, who are now involved in nation-building will complete the circle of Confederation with the inclusion of the original people of this country.

It is possible to live in harmony. It is possible to live in peace. It is not out of the realm of possibility to recognize the sanctity and dignity of the first nations of Ontario. The government of Ontario can and must stop cultural genocide now.

1550

That ends the written statement of our concerns dealing with the recent Meech Lake accord and the Langevin agreement. In addition to what our concerns are, we have tried to show the kind of process that has taken place among first nations over the last 60 or 70 years, that we have been involved directly in the kind of processes that are being discussed at this table today and that we are not attempting to deal specifically with the written word of the agreement itself.

We want people to understand that any decisions made in sharing jurisdiction and power within this country that omit the first nations of this country are having a detrimental affect on us and are dealing with the process of cultural genocide.

Mr. Chairman: Thank you very much, Chief Peters, for the presentation, which has brought us into another area, for the first time, in some depth. I would like to open the questions with Mr. Eves.

Mr. Eves: Chief Peters, as you well know, for a brief period of time--some six, seven or eight months--I was involved with your process with respect to self-government. Believe me, I appreciate--perhaps not nearly as

greatly as you--the frustration that you and your people must feel, having had to cope with the problem, not for a matter of six or seven months but for six or seven decades at the least.

I too find it somewhat inconsistent that 11 first ministers in this country can sit down and agree upon such a vague or ambiguous term as "distinct society" in a matter of less than 40 hours of negotiation and yet, as you say, when you ask for similar treatment, everything must be spelled out and all the i's dotted and t's crossed, so to speak, before they are willing to take such steps.

Perhaps you could be of some assistance to the committee in indicating to the committee more specific examples, if you can, of the type of resolution you feel our committee could recommend to the Ontario Legislature which could either amend the accord or take the steps you would like to see with respect to recognition and your rights.

Chief Peters: First of all, one of our major concerns that we deal with in the process is the political will that is being demonstrated, or I should say, not being demonstrated, by the federal government in this process and its inability to take the lead in dealing with aboriginal and treaty constitutional matters.

Second, within the process of the Ontario government as well, we have not found that political will to be evident in going the extra distance to be an innovator and a changer of the status quo in dealing with the question of our aboriginal treaty rights.

Some of the recommendations we had put forward before to the joint committee nationally and which we would still put to this committee are as follows. We wanted to continue working towards the resolution of constitutional aboriginal issues. We wanted to restore the constitutional funding to aboriginal organizations so that there could be ongoing research and participation directly with the ministers and the officials. We wanted to establish a timetable and a work plan for the federal government to prepare for future first ministers' conferences. We wanted closed sessions as well as open sessions on the constitutional discussions, and we wanted to establish 1990 as a deadline for the resumption of dealing with our aboriginal constitutional matters.

Further to that, what for us was very difficult in dealing with the agreement itself, and which we would like to see dealt with in some manner, is the definition of "distinct society," which was very vague and which was put into the agreement. There was a similar proposal that was put forward to the joint committee by the national Liberal Party that would have us fall under the same category. They offered to put forward an amendment that dealt specifically with the first nations being recognized as a distinct society.

Unfortunately for us, the problem with the "distinct society" process is that there are provisions, conditions and criteria that are attached to that same kind of amendment that is being put forward. The bottom line is that it does not recognize the fact that we have aboriginal treaty rights in this country, and it maintains the status quo of the division of powers of jurisdiction within Canada and the provinces.

In terms of the accord itself, without getting to the heart of the accord, I do not know what could be done specifically to include provisions dealing with aboriginal treaty rights that would make a significant impact on

the kind of legal process in Canada and what is needed to clarify across this country once and for all the legal rights that we have as first nations in this country.

Certainly it could have amendments that deal specifically with some of the recommendations that we outlined and deal with the process that would, I guess in a manner of speaking, put us in a trust situation again where we would have to trust people to go back into a format where we would attempt to resolve problems again with aboriginal treaty rights.

I guess the bottom line is this: I know the Prime Minister has said he is not prepared to open up the agreement. I know the Premier of this province has said it would take a vast miracle of some sort in order for this process to be opened up again. So the only thing that is currently available to us is to add an amendment that would deal with the process for us to re-establish the constitutional mechanism to try to get involved in the constitutional process of implementation.

What I would like to make very clear to the committee is something that is not well understood a lot of times in dealing with us as aboriginal people in the country. We are not looking in the process to have the federal and provincial governments come to the table to identify and define what aboriginal and treaty rights are. We are already identified in the Constitution under section 35.

What we are looking for are mechanisms to implement aboriginal treaty rights. We are looking for ways to be able to repeal specific pieces of legislation, to make constitutional amendments and other changes that will help first nations have the ability to develop themselves without having barriers that prevent them from being able to exercise their rights and being able to continue to develop at the rate they want to develop.

I guess that is a long way of answering the question, but we definitely are looking for amendments. We would also be requesting that, unlike the national level, unless there are some specific amendments dealing with substantive Indian/first nation/aboriginal concerns as an amendment, your ratification of and agreement to this accord be withheld.

We asked the national parties to do the same thing, and we were unable to get that commitment. We were told that we should deal exclusively with some of our own people within our own provinces. We have come back, and that is the reason why we have chosen to come back to this committee, knowing that there was very little chance of dealing with the heart of the amendment itself.

Mr. Allen: Thank you, Chief Peters, and your colleagues, for coming to us with this brief. We are obviously wrestling with something that has been pretty close to the conscience of many of us and, I think, places a heavy burden on the political processes of this country. You have told us all of that again in a very poignant fashion.

Can I ask you first of all, when you discovered that Meech Lake had in fact left out any further reference to negotiations with the aboriginal peoples around self-government and other outstanding issues, and indeed left you off the table altogether, were you yourselves in contact with the government of Ontario and the Premier to carry your case forward, and what response did you get? Then perhaps you might respond to us in terms of how you evaluated the imposition of the introduction of section 16 at the Langevin round of the discussions.

Chief Peters: When we first became apprised of the situation within the agreement that there was no specific proposal dealing with aboriginal and treaty rights, our first reaction was to deal with the federal government. As you know, we are supposed to have a trust responsibility with the federal government. They are supposed to ensure that in any agreements that happen within this country of Canada our safety and protection are to be safeguarded.

1600

We directly contacted the Prime Minister of the country in dealing with the situation and the premiers and attorneys general across the country were informed by letter of our specific concerns with the Meech Lake accord.

It was Ontario that proposed the nonderogation clause in section 16 in the agreement. But when you deal with the basic premises that are there on the table currently within the constitutional format, and I mean in the bigger sense of dealing with section 35, when we get a nonderogation clause in the process, when the basic premise is that there are no rights there and rights are to be created in the negotiation process, then a nonderogation clause does not do you much good.

So the nonderogation clause, which applied only to section 2 of the agreement, dealt only with the question of when Quebec, as a distinct identity, came into conflict with aboriginal treaty rights in Quebec. It did not safeguard the aboriginal people from any other parts of the accord that were negotiated. To us, a nonderogation clause under those pretences did not do a great deal for us, because there was actually nothing much about aboriginal people in the text itself.

Mr. Allen: So nothing times nothing is nothing. That is a simple way of putting it. I want to ask you a fairly practical question. I totally sympathize, and I think all of us must, with your sense of betrayal that it was possible so quickly, when it came to sitting down and talking about it, to apparently concoct a deal that would bring Quebec back to the table of Canadian Confederation, while at the same time it had been so difficult over four years to do the same thing for the first peoples of this country.

Some people have wondered out loud, in terms of the future practice of where we go from here, whether you are better served having Quebec at the table or not. What is your judgement on that? You have asked us to withhold assent to the accord if we cannot get what I think is a very sensible and critical amendment to the section on the first ministers' conference so that you are on the agenda in the first rounds of discussions to take place.

If we cannot get that nationally, if that does not happen, is it better from your point of view that Quebec be at the table? Will that facilitate your cause nationally?

Chief Peters: To begin with, I think that is one of the major misconceptions we have been dealing with in the last five years in the constitutional process. It has always come to the table as the situation that had Quebec been involved in the constitutional process, instead of having to convince seven out of nine, you had the opportunity to convince seven out of 10. The second part was that you were dealing with a much greater population base, with Ontario and Quebec, had Quebec been in the process.

I find it very difficult to accept the proposition that had Quebec been at the table things would have been very much different. In our experiences in

dealing with the basic premise at the table, when we were talking about the kinds of powers and the kind of authority and levels of jurisdictions that first nations were trying to achieve at the constitutional table, I do not think it mattered very much what governments were present at the table. I do not firmly believe that had Quebec been there throughout the duration, there would have been a significant difference in the end result of 1987.

Miss Roberts: The fact that "distinct society" has been put in there, you do not want to be included in that "distinct society" clause? In fact, I think you already had rights enshrined in 1867 and before in many, many treaties, which are basically the way you wish us to deal with you. Am I correct in assuming that?

Chief Peters: Yes.

Miss Roberts: I do not have the background that you gentlemen have for working on this one so many, many years. Your need today, which you are expressing to us in maybe the most basic terms, is that you keep on being considered in the process and that you have a recognition in some manner, either through the Meech Lake accord or through other constitutional amendments that may take place or other meetings of first ministers or any other type of meetings, of enforcing what already exists for you.

Chief Peters: I think that is one of our primary concerns. I think you have stated very clearly that the rights of the aboriginal people are inherent to the aboriginal people. They cannot be created within the Constitution, nor can they be identified and defined within the Constitution. The treaties very clearly laid out the process of our relationship with Canada. Such documents as the royal proclamation of 1763 did not create rights, but rather created a process of determining relationships with first nations and with the government of Canada.

We would like very clearly within this country to have some recognition of those kinds of treaties and those kinds of statutes that are now enshrined in the Constitution Act of 1982. If the Constitution Act of 1982 has any legal validity, then obviously the treaties that are enshrined in there, the royal proclamation that is enshrined in there, must also have some validity.

For us to be able to enter into a court of law with those documents and say that we have the legal right to enforce our treaties within this country, that should be there for us and should be operational without question in this country, but unfortunately it is not. We have to come back to processes like this again and repeat to people that we are not in the process simply to look for amendments that would say, "Let us alter the process so we can move in a different direction." First and foremost, we are looking for constitutional recognition of the entity that we are as people, as human beings, as distinct people of this country, not to be confused with "distinct society," as in the accord itself.

Those are the kinds of mechanisms that we look for. I do not think anybody from the aboriginal side, in the five years of the constitutional process, ever came out and said: "We want self-government today, we want it immediately, and tomorrow we are going to change the entire focus of Canada. Tomorrow, everything is going to change in this country, your laws, your courts, your parliaments, your legislatures, everything is going to change because suddenly you are going to have all these Indian enclaves running around with specific jurisdictions that are totally different than the existing laws of the land."

We are looking for a process and for mechanisms to enact the rights that we have. We know it is going to be a long-term process, but we understand very clearly in the process that we ourselves have a tremendous amount of development to do within our communities to get to that stage. But in order to move, we have to have mechanisms, we have to have doors opened, we have to have political willingness out there to help us achieve those levels. That is what we are looking for in these kinds of processes.

When I outlined the kind of process we have had for the last 65 or 68 years, it would seem very fair for us to be able to come to this committee and say, "We think the committee has a very upstanding, moral obligation to the first-nation citizens of this country to put some kind of leverage in place to help us reverse the injustices that have occurred." We do not think that is unfair. We think it is very rational. We think it is a question that the Canadian public has wrestled with and dealt with. I think that is why we are in the Constitution today, under section 35.

Mr. Breaugh: There are many of us who feel that the great shame of this nation is that it has never fulfilled its legal obligations to its aboriginal people. In a sense, the nation is kind of founded on a lie, on broken promises. It has never fulfilled those obligations.

There are many of us too who felt that, about this time last year, we were finally getting to the point where we might have some kind of an agreement. We felt we were that close. But in that final conference, it was decided, I guess, to generalize, that it was too complicated, not clear enough, not possible. We were saddened that it went away defeated. Yet a month later, all things were possible, "No problem about language here; we will just put it all down now and figure it out later."

You mentioned in your brief today that the federal joint committee recommended a first ministers' conference before 1990. I am torn between saying, "Really, why bother? What would be the use of another one of those? What has changed?" and the rather darker scenario that if it is not done now and this accord comes to full agreement, it really appears to me that it may never be possible. I would really be interested in hearing which way you would urge us to cut on that.

1610

Chief Peters: That is one of the major problems we face right now. There is a tremendous awareness among the Canadian public right now that there are major problems dealing with the implementation of aboriginal treaty rights in this country. We do not want to lose that focus we have with the Canadian public right now.

I guess it is in the same vein as the question that was asked earlier about the inclusion of Quebec in the process; a lot of people see the process as still being very dark and dismal, even though the accord may go through and Quebec may become part of Confederation.

We think it is essential that we resume these discussions. We also think it is essential that if we are put in the position where we are asked to come to the table with very concrete models of what we determine to be our own process of self-government, those are given consideration, the aboriginal agenda that goes on the table is given consideration.

In the five years of the process that we have gone through, we have not

dealt with the aboriginal agenda since 1983. The only part of the aboriginal agenda that was dealt with was the extension of the conferences, where there were three conferences added over four years, to deal with the problem. That was included. That was the part of the aboriginal agenda that was adopted.

Since then, the discussions on self-government have been very limited to a learning process. In the five years of the process that we have gone through, we have had to go through and we have had to educate people on the very basics of who we are, first of all, as people. The historical knowledge that was being presented by the federal government was totally out of whack with the kind of historical documentation that we were putting forward. We are certainly not prepared to accept the Bering Strait theory as a matter of the question as to how we arrived in this country. We did not think it was fair that this kind of historical information should be supplied by the federal government and put on the table.

Throughout the process, we still maintained that the education that went on and the understanding that went on was very clearly starting to generate more response among people. It had a good and a bad effect. Some provinces were moving more towards the positive aspect, some provinces were moving more to a negative aspect, but it did have an effect. For us now to say that we would not want to go back into a constitutional conference until a later date would have a very detrimental effect on us and the relationship that now exists with the different premiers, attorneys general and all the people who are involved in the constitutional process.

I think if there was some kind of political will that was available, there would be an opportunity for us, in the province of Ontario especially, to be able to sit down and work out some very concrete models of self-government; to be able to sit down and say: "When we are talking about control of our education or we are talking about control of our policing, these are the kinds of situations we would like to deal with. These are the barriers. These are the necessary components of impasses that have to be either removed or added so that we can give concrete proof to the Canadian public that we are not going to turn the country topsy-turvy."

Those are very easy processes to be involved in. The unfortunate thing is that in the constitutional process there is no process of that kind of development that occurred in the five-year process from first ministers' conference to first ministers' conference. That development stage was not there.

Now we are looking for the resumption of funding to flow back to the organizations so we can actually start that process, so that in 1990, if it is two years from now, we can actually go to the table and have those models. We can say: "Do you want to know what the impact of Indian self-government is? This is the impact. This is how it is going to change your law. This is how we feel it is going to change our community. These are the things that we should agree upon, that we see a joint responsibility in sharing. This is how we will work out matters."

I think in our minds it is clear that the kind of guarantees that we need to move in that direction are essential, because without the guarantees we are back to the treaty process. We are back to saying, "Yes, we will sign another agreement with you and we will trust you to implement it." We have no enforcement mechanism and we have no way of dealing with this situation other than litigation, and litigation certainly has not been one of our most rewarding processes to date.

Mr. Breaugh: I know what it is like to sign an accord and then it watch it fall apart.

Chief Peters: I understand. You were one of the drafters.

Mr. Breaugh: Maybe that is the problem.

Mr. Chairman: Chief Peters, if I might, on behalf of the members of the committee, thank you and your colleagues for coming today and making your presentation and particularly for answering the questions so frankly in terms of what we might be able to consider in moving this whole issue further on the table. We are very grateful to you for that.

Chief Peters: As a last comment, Mr. Chairman, what we have tried to open up today are some of the questions in some of the areas that are of major concern to us in dealing with the kind of perspective that has taken us to this point in 1988.

We have additional representation tomorrow with the Anishinabeks and with the Association of Iroquois and Allied Indians, who will address some of the questions. I ask the committee to set its mind to some of the questions and some of the issues that we raised today. With the questions that you have not been able to ask today or have not been able to formulate in the discussions we have had, you will have the opportunity again tomorrow to be able to ask questions in that specific area.

Mr. Chairman: Thank you. I believe also you made reference to the problem at Kettle Point. I believe when we are in London, we are going to be hearing from them as well. I hope that will help our education as we go along. Thank you once again.

If I might, may I ask the representatives of the Congress of Black Women of Canada, Jean Augustine and Akua Benjamin, if they would please come forward. Just take a deep breath while we move around here. I apologize, but it seems as we get to the end of the morning or afternoon session, I am afraid we are always running a bit late. I hope you have found some of the sessions you have sat through as interesting as we have and we are grateful that you hung in.

On behalf of the committee, I want to thank you for coming. Perhaps if I might simply turn the floor over to you and we will hear your statement and then open it up to questions, however you would like to proceed.

CONGRESS OF BLACK WOMEN OF CANADA

Ms. Augustine: I am Jean Augustine and this is Akua Benjamin. Had we known that we would be this time, a number of our women who are presently very busy in the areas of occupation where they could not get the time off might have been able to join us, but we are speaking on behalf of a good number of people whose minds and hearts are with us at this time.

The Congress of Black Women of Canada welcomes this opportunity to address our concerns about several sections of the Meech Lake accord, sections which, because of their lack of clarity, raise many questions for us. The Congress of Black Women of Canada is a nonprofit national organization established to focus on and bring due recognition to the role of black women in Canadian society. The Ontario region is comprised of chapters and affiliates located throughout the province, especially in the urban areas.

The primary purpose and objectives of the congress are to plan and implement a program of education, service and action geared to the needs of black women; to work with other organizations on mutual issues and concerns, particularly those relevant to black women; to provide a network of support for black women of Canada and to advocate for meaningful social change aimed at improving the lives of black women and their families; and, lastly, to contribute in the creation of equality, justice and human rights in Canada.

We appreciate this opportunity to intervene at this public hearing because as black women in Canadian society we have serious concerns about the accord as it presently stands. We will not address all of the issues which create confusion for us, but we will focus on the four most pressing areas that alarm us, and I will name those areas: section 2(1)(a) and (b), which recognize French-speaking and English-speaking Canada as constituting a fundamental characteristic of Canada, and the recognition that Quebec constitutes within Canada a distinct society; sections 95a and 95b(1) and (2), which specify agreements on immigration and aliens; the section which refers to shared-cost programs; and, finally, we are concerned that the essence of section 15 of the Charter of Rights and Freedoms is omitted from section 16 of the accord, which addresses multicultural rights, and is weak in guaranteeing our rights on the basis of sex and race.

1620

Before doing so, we wish to comment on the process. I know you have heard, in the last two presentations, comments on the process, but we wish to comment again on the process.

The Meech Lake accord, from its inception, was developed with little input from women's organizations across Canada. On this issue that will have a very direct and drastic impact on our lives, it is not only important that the consultation occur but that women's viewpoints be given serious consideration.

We are saying this because we understood our Premier's promise not to sign the accord until Ontarians were given the opportunity to respond. Yet, recently he has been recorded as saying that no real changes are possible in the accord and he is satisfied with it in its present state. Therefore, we urge the Premier, through you, to heed these consultations and the recommendations therefrom and have those recommendations reflected in his future actions.

Akua will take us to the major concerns.

Ms. Benjamin: As Jean has pointed out, one of our major concerns is clause 2(1)(a), the fundamental characteristic clause. Our concern in that is that the multicultural groups and others like native people are not included as part of the fundamental characteristics of Canada. Yet, their rights are enshrined in the Charter of Rights and Freedoms. We question the distinction that would give us our rights and freedoms on the one hand, in one constitutional document, while omitting us as a fundamental characteristic of this country, on the other--meaning with reference to the accord.

Further, clause (b) of this section outlines Quebec as a distinct society and section 16 indicates that native and multicultural rights are not affected by this clause. However, we question the concept of "distinct society" being attributed to one province while no such distinctiveness is accorded to other provinces or members of other provincial groups. Inherent for us in this notion of Quebec as a distinct society is the notion of inequality between provinces and between groups.

We are further concerned about black women and their families in the province of Quebec who raise to us the following questions: Are they part of the distinct society or are they seen as members of the multicultural groups? What is their relationship as French-speaking Haitians, for example, to French-speaking Quebecers?

Section 95a and 95b(1) and (2), the agreements on immigration and aliens: We feel that under the accord this will not only allow provinces to negotiate immigration quotas, but it may well be that each province can select countries from which to draw immigrants. We are concerned that this allows a checkerboard immigration system where immigrants, or certain immigrants, are welcome in one province but perhaps not in another.

We feel strongly that this section of the accord will not only weaken the centrality of Canada as a country, but it will promote insularity between provinces, open the door to discrimination of one group or country over the other and, above all, violate mobility rights of Canadians, as outlined in the charter.

Section 106A, the shared-cost programs: We oppose this provision, which gives the provinces the right to opt out of national programs "if the province carries on a program or initiative that is compatible with national objectives."

As black women, we feel that all Canadians should be accorded the same level of basic services, as would be guaranteed by national programs. The vagueness of subsections 95(a) and 95(c), with reference to "national objective" as a basis for shared-cost programs, worry us as a minority group scattered across Canada. Who determines national objectives? Can provinces not justify their own deviation from national objectives because of their own interpretation of the term? We feel extremely vulnerable by this clause.

At present we benefit from federally funded programs and services. These include language training, skills training, health care, welfare programs, etc. If these are placed under provincial jurisdictions, this will give rise to regional disparities and inequalities in the provision of these vital services and programs. Black women, because of their representation among groups that will need these services most, will be particularly hard hit by such provincial decisions to opt out.

Individual and equality rights: We are seriously concerned about the omission of equality rights and individual rights of black women and other women of colour as specified in section 15 of the Charter of Rights and Freedoms. We feel these rights are put at risk by the accord. Section 16 of the accord addresses multicultural rights as being protected from the accord's guarantees of linguistic duality and distinct society. However, multiculturalism has often been interpreted narrowly as cultural artefacts, without the weight of protection against "discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" and all the other categories that are outlined in section 15 of the charter.

For us as black women, rights we gained in 1982 should not be rescinded through the Meech Lake accord. The accord should reflect the interests and aspirations of racial minority women, along with all other peoples across Canada.

Ms. Augustine: In summary, the parliamentary task force which

produced the report Equality Now, documented and showed strong evidence of the level of racism in Canadian society. Our governments have moved to bring about measures to address this social ill; for example, the employment equity program coming out of Rosalie Abella's task force.

A Constitution governs all other laws and all actions taken by any government. Our Canadian Constitution must also enshrine and guarantee the rights and freedoms of all its citizens, including those who belong to different racial and ethnic background. It must also protect its citizens against inequality, discrimination and injustice. This cannot be left to interpretation or couched in vagaries or ambiguities.

Black women and their families are woven into the Canadian fabric. We equally want to see Quebec's full participation in the Constitution to strengthen our nation; however, we urge that this be not attained at a cost.

Ms. Benjamin: The recommendations that we are putting forward are in line with our presentation. That is, we recommend that section 2(1) be changed to reflect the multicultural composition of Canada; that is, that recognition be also given to Canadians whose mother tongue is neither French nor English and that they also constitute a fundamental characteristic of Canada.

On immigration, that the federal government remain as the central decision-making body with respect to the admission of immigrants and that this clause in the accord giving powers to the province be deleted.

On shared-cost program, that the federal government retain again its centrality in the decision-making and funding of social programs and that the clause in the accord be deleted.

Section 15 of the Charter of Rights and Freedoms must be included in the accord.

Finally, we urge that in view of the omissions, weaknesses and negative implications contained in the accord, this document be carefully amended before ratification.

1630

Mr. Chairman: Thank you very much for a very specific and clear brief. I wonder if I could just begin, because this has come up a couple of times today and I would just like to make sure that I understand your position. This is with respect to immigration and the role of the federal and provincial governments.

It was my understanding, from what others have told us about the section on immigration, that what was affected there was that the federal government could enter into an agreement, as it has with Quebec on immigration and as we have discovered it has done with a number of other provinces, but whatever that agreement was, it could not affect anything that fell under the charter. In other words, it could not designate that people could come only from country X and not country Y. It could say nothing about the racial or religious makeup of those people and, indeed, once someone arrived in a particular province, that person's mobility rights were protected and he or she could go anywhere.

I want to be clear here. I guess one suggestion is that these clauses in section 95 simply take what has been a policy-agreement between Quebec and the

federal government and a few other provinces and put this in the Constitution. One might argue, why do we need that in the Constitution, but it seemed to me when one looks at 95b(3) that the Canadian Charter of Rights and Freedoms application to this would, at least in this instance, meet the concern that you had about whether provinces could try to play games and alter either the ethnic composition or religious composition or any other element.

I would like to be clear on that in terms of your concerns with that particular section.

Ms. Benjamin: This is why we feel it is very vague and ambiguous. If there already exists agreement between the federal and provincial governments and that is enshrined in the charter, then why should it be in the accord? What we see in the accord, by making reference to immigration, and again the levels of immigration, the numbers, the countries that they should come from, is that it is subject to interpretation by a province, which may very have negative implications in terms of the implementation of this particular clause in the agreement, if this already exists.

We do not have any problem with the fact that it already exists, but by putting it into the accord, we are saying then it is subject at this point to be interpreted and it is subject to be interpreted in a number of different ways. We are raising ways that it could be interpreted from henceforth.

Mr. Chairman: So your fundamental concern with that section would be if essentially it said when the federal government determines that so many immigrants will be permitted into the country in a particular year and it works out with the provinces numbers for various regions, if that is all it is and that does not speak to ethnicity or religious background, a variety of other things, and if those people upon entering the country do have the same charter rights as you or I, then if that were clear, that would be acceptable.

Ms. Benjamin: That is right.

Mr. Chairman: The problem you have is if there is some ambiguity surrounding all of that, then you have concerns in terms of what might happen.

Ms. Benjamin: That is right.

Ms. Augustine: I think we can push it further to the notion of the distinct society and if Quebec is a distinct society, maybe in order to keep the distinctiveness one might look at certain cultural aspects, language and all the other things that would help to keep that society as outlined.

I think there are a number of things which, when rolled together, do create some confusion.

Mr. Offer: I would like to thank you very much for your presentation. I think in bringing up the whole question of immigration, it is going to be an area which we are going to, I would suggest, probably as this committee continues, get involved in with respect to that one aspect in some very great detail.

I think there is concern in your submission, obviously, with respect to how the whole question of immigration is affected by the Langevin agreement. I think that as we go through the process, we will be bringing forth some of the aspects of the agreement and how this particular area is now administered in terms of the numbers of persons who come into the country.

This particular agreement, from my readings, does not impact on that question at all in terms of immigration being, I understand, a shared responsibility between the provinces and the federal government. This agreement is really putting in the Constitution an agreement that in fact has existed in Quebec, for instance, for some years and agreements that have existed in other provinces in some degree or another for a number of years. I think that your concerns are important, and they are important for us to address. I would expect that we will be able to address those concerns as we proceed.

I would like to deal with your concerns on account of the question of multiculturalism and women's rights. I think you have brought out both of those concerns, which are related yet distinct. We have heard in our committee that section 16, which you have brought forward, deals with sections of an interpretative nature, to make certain that regarding the whole question of multiculturalism and a distinct society, they are all used as interpretative tools as opposed to rights-giving sections.

The multicultural question will not be negatively affected under this agreement by virtue of section 16; it does not deal with rights but rather with how sections are to be interpreted. I am wondering if you can share with me your feelings with respect to section 16.

Ms. Benjamin: Before I do, I just want to speak a little bit to the whole question of interpretative versus substantive, because we have had a lot of discussion about this and it still is not clear to us which clauses are supposed to be substantive as opposed to interpretative. For instance, very often when we see a clause like section 16, and it is supposed to be interpretative, what has happened in practice has been that it has turned out to be substantive, or vice versa. So that is part of the confusion we have about that.

I will let Jean speak about the substance of what you are getting at, and that is this whole question of where does multiculturalism fit in and how do we see it in light of "distinct society" and the provision of section 16 itself.

Ms. Augustine: I am going to go in a very circular way, because I think part of this and part of the fact that we are having these hearings and these discussions is because there is so much confusion and lack of clarity in all of this.

Our community--when I say "our community," I am talking about the black community of both men and women--is not only the black Canadian community; it is not only a community of people who are native Canadians but also people who belong to the multicultural community. So a lot of the concerns for us are concerns around the whole notion of social integration, being part of Canadian society, etc.

We have through past experience, looking again at Canadian immigration practices and laws and through history--Canadian history has not been a history that has shown a lot of fairness and a lot of justice and everything else to various groups around the years. It is sad to make that comment, but it is part of our history.

Therefore, when we see something like the Constitution and we have confusion around certain clauses as to whether they are so or are not so, whether they are interpretative or substantive, we are a bit confused and we

are concerned because, to use popular parlance, when the crunch comes, it is the law, the legality that would somehow give us the necessary means to get justice for whatever our causes are.

1640

We want to see things clearly written out so that we know that this protects us in a specific fashion and not that it could be interpreted in this way or the other. I think this is the way I will answer this rather than go through it. I am not a legal person; therefore, I cannot tell you that this specifically says this. I am talking as someone who is part of the community, whose life will be affected very much by the accord, with court judgements and other things that are done by lawyers.

Interpreting this will affect me and mine and many others. I am sure there will be many legal people who will be coming before you, making the necessary legal interpretation, but I am saying to you as a community person--because I think these hearings are for people to come forward--that we feel very insecure and very much threatened because there are some things that are "notwithstanding" and some things that are not affected. Heritage is in here. Multiculturalism and social integration mean something else for us, on the other hand, and if this is not in here and it is some place else, how do we put all of these pieces together?

I know this maybe does not make book sense, but at the same time this is the way we feel as we view this out in the communities.

Ms. Benjamin: Can I just elaborate a little bit on that? In our brief we talk about what has happened, particularly in the province, except for the last multicultural policy, which has changed somewhat. Very often the notion of multiculturalism has to do with heritage; it has to do with the fabric, the makeup, the composition of the society. Along with that are all the artefacts--the dress, the dance, the food--all the things that come along with being part of the culture.

Multiculturalism has not addressed the whole question of discrimination. It has not really focused on the difference in terms of treatment, participation or access that people have felt and experienced over the years. It has simply looked at people's participation in the society from that vantage point and has not looked at some of the issues and problems. This is why, when we see the clause making reference to multiculturalism, it is not clear whether it is beginning to talk about discrimination, injustices, social inequalities--all the things that we know that these people who fall into this category have experienced. This why we feel that section 15, which says in all the categories, "Thou shalt not discriminate on the basis of race or sex"--

Ms. Benjamin: Plainly and clearly.

Ms. Augustine: Very clearly it is spelled out. We know that is a protection; that is there. It is written in the Constitution. It is clear. There is no quibbling about that particular clause. Individual rights are enshrined; they are protected. This is what we want to see reflected in the accord.

Mr. Offer: There are many who would say--and I would think most, if not all--that section 15 of the charter is not affected by this, that it remains as strong today as it was the day it was enacted. What we are talking about in section 2 with respect to the question of a distinct society and in

section 16, dealing particularly with multicultural groups, is that the laws will be interpreted in such a manner, keeping in mind those aspects of our society.

I am very pleased that you really have come today and spoken to us in terms of saying, "Listen, we are just not sure as to how it affect us, how it impacts on us." I think that is important for this committee to know. I thank you because you have done it in a very clear and succinct way.

Ms. Benjamin: I just want to pick up on the last point. Our understanding--again very shady, very grey--is that there seems to be a hierarchy in terms of constitutional documents. This is one of the questions that we have. Does the accord take precedence over the charter or vice versa, or is the act of 1867 the document? We do not know in terms of the hierarchy where this one falls and how it will be interpreted, given that whole vagary at this point.

Mr. Cordiano: I want to say something because I think this is very fundamental and I just want to have a very brief supplementary question.

We are all trying to grapple with words basically, because that is what we are dealing with in the charter, in the accord, the Constitution Act, 1982 and in fact the Constitution of 1867. We all have to deal with the words and what they mean.

The legal experts who came before us--and I am not a legal or constitutional expert of any kind--tell us that section 15 says explicitly, "Every individual is equal before and under the law and has the right to the equal protection...." The word "right" is in section 15. If you look at section 27, it says, "This charter shall be interpreted...."

The kind of explanation that was given to me is that the words are explicit in these sections: A right is a right in section 15 because the word "right" is used. In section 27, it is not a right; it is an interpretative clause because the word "interpreted" is used. I think that made some sense to me.

The trouble I have with that--certainly the point has been made on a number of occasions, and you are making it again--is what do we mean by "multiculturalism"? When you are trying to interpret all of this, what is meant by that? Are there rights inherent for groups that are neither English nor French? Are there rights inherent there? Perhaps that is a problem outside of the accord. That is something that certainly I want to address as we go on and look to the process of a continuing kind of conference approach that may be implemented as a result of this accord.

If you look at what the Quebec "distinct society" means, I think in looking at what a fundamental characteristic of Canada means, you would also have to include in there that, certainly in Quebec, "distinct society" would also mean the various groups that are contained within Quebec; that is, the English-speaking minority and all of the other ethnic groups that exist in Quebec and that have existed there for some time and that will perhaps be added to. I think that is one interpretation that was offered to us.

I do not know if you agree with me on some of those points, but I just wanted to make those comments.

Ms. Benjamin: Again, in terms of black women, what does that say? What is distinctive about a black Haitian woman living in Quebec as opposed to

a black West Indian woman living in Ontario? It would come down to that kind of basic question for us to grapple with. What does it mean that you have multicultural groups in Quebec having that whole character of being a distinct society as opposed to multicultural or other groups of people living in other provinces? That is what is very vague. What does it really mean as a distinct society, and what does it mean that this is a fundamental characteristic of Canada?

For us, when we talk about the notion of inequality--and again it is a simply a notion--are we putting one province above the other? Are we putting one group of people against the others? I know that the accord was not drafted quite that way. I understand that. But because we are not clear, these are the questions that we have.

I know a constitution cannot be as explicit perhaps as one would like, but we want the language written in a way that all this shadiness and these grey areas will be reduced substantially so that we know very clearly, when we talk about the distinctiveness of a society, what that really means. What are the mechanisms that are in place? What are the processes? How are groups seen in relation to others? I do not know if that means policy documents are going to flow or rules are going to come out of this perhaps, but we want something that would give us a sense of what it really translates itself to.

Mr. Cordiano: The difficulty that I have--I am sorry; I am going on, and I will not go on. I should give someone else an opportunity. Mr. Allen has been patiently waiting.

1650

Mr. Allen: They are all good questions and they are all good answers, well worth asking and answering.

While we are on that question, it is worth noting that section 15 of the charter not only has subsection 1, which makes the statement about "benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability," but also has a second subsection, as you remember, which would cope with the problem you might have if some people said: "But then you are engaging in affirmative action programs to do something for a minority group that is disadvantaged, for example, women who do not have equal pay for work of equal value, did not have before the law and still do not have," and so on.

There are some very fine shadings already in some of this language. In addition to Mr. Cordiano's point that came up in our discussions with some of the experts who came before us, the other thing is that it is important to realize that all parts of the Constitution are equally present to all other parts. That is, if the accord is passed, the provisions that are written in the charter are all automatically there with the accord. They qualify it at every point, so that it should be impossible to read section 2(1) of the accord relating to the distinct society without also reading section 15 of the charter in your head at exactly the same time.

That was quite reassuring to me because I was very concerned about many of the problems you have been raising. In particular, I was concerned about the whole panorama of minority groups that exist not only in Quebec but also in Ontario and every province and, in particular, visible minority groups that have had the greatest problem in getting appropriate equality within our society.

I wonder if it helps at all to take the immigration section that you are raising and lay it beside the "distinct society" section. I just raise that as a question because it had not occurred to me until you were talking to us that the agreement the federal government has with Quebec is designed to underline a distinct aspect of Quebec society, probably the most distinct aspect in Canada, namely, that it is the only province in the country where French is predominantly the language of daily life. That is probably the only clear thing that comes out of this part of the accord.

If you look at the agreement with the federal government, it gives special recognition to Quebec's capacity to recruit and accept French-speaking people who come from French-speaking territories and countries elsewhere in the world. Inescapably, that has meant that Haitians, for example, whom you referred to in your statement, have come to Quebec to strengthen the distinct society of Quebec. One could say the same of people who might have come from Senegal or from Vietnam who are French-speaking. So that implicit in the strengthening of the distinct society has been an immigration understanding that has brought a greater multicultural character to Quebec. One would hope that alongside that, one would always read section 15 so that the equality dimensions of all that were constantly in play.

I put that all together just because I am trying to wrestle my own way through all this murky stuff to see where I come out. Does that give any new focus for things for you, or does it still leave problems? I am very sensitive to the fact that when you are there and you are in the situation and you are asking the question and you have your relatives and friends in Montreal and you have them here in Toronto, there are lots of things you see that I do not see.

Ms. Augustine: Before you delve into it, I am going to go back again to the point I made earlier, and that is the importance of something as a constitution and that we should not be speculating as to this, that, the other and the next.

This is really the problem I have with this, that we can sit around the table and we have sat around from the time this came on the scene. Depending on how we read it or depending on the political leanings or the ideological stance or whatever, we find all kinds of interpretation. We find all kinds of ways in which we can blend something with something else. We can pull something from this and make it match this. We can use the goodness of our nature and say there is just no way we can leave out section 15.

Of course, we have to interpret those kinds of things here, but then we saw certain instances like Bill 30 in Ontario, the public school legislation. We found that they went back to section 93 or whatever in the 1867 act and overruled what was thought to be a clear charter. There were so many things, and this is the problem I have with all of this. This is why I think it is a bad document. I feel these hearings just give a bit of hope that at the end of everything else, we will see some amendment that would make it better.

Mr. Allen: How would you reword section 2(1)? What kind of language would you like to see in there that would help to define "distinct society" in such a way that it includes your special concerns? Would you want it done there or would you want it done somewhere else in the accord? Do you want something stronger than section 16 which is presently there and is sort of circular? It does not really take you very far.

Ms. Augustine: We should have brought our lawyers with us.

Mr. Chairman: Maybe not.

Ms. Benjamin: Once I understand all the ramifications of what "distinct society" means, then I would go ahead and talk about changing or amending that whole notion. But the concept itself of "distinct society" is not even clear to me, so I am not clear on how to follow up with wording it differently or placing it in some different way.

What confuses me even more as we speak is, when you place the "distinct society" as one clause and you talk about individual rights for Quebecers, what does that mean? Do group rights take precedence over individual rights? There is so much vagueness to that. What does that mean in terms of the rest of Canada? They have distinct rights and they also have individual rights. What does that actually mean? That is one thing that bothers me.

The other thing is the whole immigration question. When Quebec argues that it wants a five per cent increase in the quota numbers, does that mean that Quebec is going to be more multicultural than the rest of Canada? To us, this is where we begin to talk about the checkerboard pattern of immigration. You have one province that seemingly is going to look one particular way as opposed to other parts of the country.

When people migrate--at least, when we migrate, we migrate to one country. We do not migrate to a province. We may choose a province based on a number of different criteria--families may be there, or language or access to jobs may be there--but it is not simply based on the fact of helping to develop one part of the country in a multicultural way as opposed to another. So I have problems with that whole notion of Quebec having five per cent.

I am saying all this because it comes back to what we understand about the "fundamental characteristic" clause, which we feel should be reflective of all the people who live in the country. If it is a recognition just based on language groups of English and French, although those are the two national languages, there is recognition of that or there should be recognition that we have two official language groups. But does that mean that is the fundamental character of the country? What about other people whose mother tongue is neither English nor French? That is recognized in provincial statutes, at least in this province. We talk about all the different language groups we have. Where do they fit in?

Mr. Allen: Those are very good questions; they are all very fundamental questions. If you can solve the problem of the relationship between individual rights and collective rights under our Constitution, you have done better than just about anybody else who has had a crack at it. It really is a very complicated question, very involved.

My own sense of sympathy does suggest that there is something legitimate about collective rights of a province that has a different character in terms of its language, its civil law traditions and attitudes on a whole range of questions, without giving up the ghost on equality questions and things like that. Those are ongoing debates, and we always have to struggle to make certain that it all comes out right. I guess that is what we are all here for, to make sure that it happens right.

You are raising some very basic and important questions for us. I really appreciate your coming and putting them the way you have.

Mr. Chairman: As we move through in this committee, we think we have

heard about a certain area. We go off and have lunch or supper and have a good sleep and we say, "Gee, I think I understand that." Then along come more people to raise more questions that themselves raise questions. But I think that is what a large part of this process is really about, to raise those concerns.

You have certainly brought a perspective that is new for us to this point in the hearings. While we cannot answer all your questions, I think it is very good that you have posed them and that you have added some dilemmas for us to wrestle with. We very much appreciate your taking the time today. Again, I apologize that we got behind schedule, but certainly from the committee's point of view, the time has been very much justified by what we have received. We thank you for coming.

We stand adjourned until 10 o'clock tomorrow morning.

The committee adjourned at 5:03 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, FEBRUARY 18, 1988

Morning Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Sterling, Norman W. (Carleton PC) for Mr. Harris

Clerk: Deller, Deborah

Witnesses:

Individual Presentation:

Boychyn, Mike

From the Association of Iroquois and Allied Indians:

Doxtator, Harry, President

From the Citizens for Public Justice:

Carrick, Wayne, Secretary of Executive Committee, Ontario Division

Vandezande, Gerald, Public Affairs Director

Olthuis, John, Legal Adviser and Research Director

From the Metro Action Committee on Public Violence against Women and Children:

Marshall, Patricia, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, February 18, 1988

The committee met at 10:05 a.m. in room 151.

1987 CONSTITUTIONAL ACCORD

(continued)

Mr. Chairman: I will call the morning session to order. We are going to alter our order. Our first witness is not here as yet, but Mike Boychyn, who is also to appear this morning, is. In order to move forward, if I might invite Mr. Boychyn to the table, we will let him begin with the first presentation. I believe his presentation is being circulated right now.

Thank you for coming, Mr. Boychyn, and for being here early so that we could ask you to fill the gap. I will turn the floor over to you. If you would like to proceed with your presentation, we can ask some questions when you have completed.

MIKE BOYCHYN

Mr. Boychyn: My name is Mike Boychyn. I am a concerned retiree. I wish to express my gratitude for this government-citizen relationship. The popular vote arrived at through dialogue has been the imperative and the meaning of our democratic form of government. Our pride of distinction from other forms of government as devised by people throughout history.

A veto wielded by an individual or a minority is destructive of our democratic principles. Our Prime Minister, Mr. Mulroney, has handed to our 10 recognized provinces just such a conspiratorial potential. Only through the strength of the vote of the majority of Canadian premiers could any future renegade aspirations such as separation, which would be the ultimate meaning of the words "distinct society." The democratic vote, not the impediments of the veto, would have the necessary tempering effect to rein in any renegade aspirations within the Canadian Constitution of a federated Canada.

Prime Minister Brian Mulroney has expressed his confidence in his monetary controls that the federal government can resort to for effective control of numerous provinces. Canadian loyalty and confidence should be based more solidly on the legal and constitutional law. The current shift and economic financial realignment programs become very unpredictable. Some provinces have already made suggestions and veiled threats of foreign co-operation towards such aspirations.

It is in this spirit and concern that Canadians across the country are asking whether the Meech Lake accord is that bad. In Canada's past history, the then Prime Minister, Pierre Trudeau, stated that the federal government should not be a valet or a servant to the provinces. In a democracy such statements should be rejected outright. It remains the upward mobility of grass-roots decisions through the provinces to the federal level of government.

Fears are expressed that weakening of the federal government powers would make it incapable of enacting broad federal legislative and social programs favourable to the Canadian public. We must not forget that

unfavourable legislation would be less likely to be rammed through. Provincial accord would take on greater significance in moderating a predominantly federal runaway power grab. Had powers that spring from provincial sources been established instead of being just in the present beginning stages, our present trade situation might not have been as precarious. Provincial influence that is closer to grass roots is more easily guided by public expression in the influence of federal policy.

It is the present lack of credibility our federal Conservatives have earned that we oppose the Meech Lake accord. Provincial government nominees for appointment to the Canadian Senate would offer a greater mix of talent and objectivity. They may periodically be considered for reapproval and not act as lifelong retirees. Such senators would owe dedication not out of patronage, but to Canada generally.

1010

In a democratic country political control is based in the hands and the trust of our inhabitants, not on monetary and military enforcement. Canadian citizens, regardless of population density, are trustees of the regions of Canada they find themselves inhabiting. If we seek to diminish their representation because of sparse population, we diminish our accord and our territorial integrity. Our problems with the veto may not be the limited interpretations we may attempt to attribute to the veto.

I might explain that. I got a letter after I had written this and one of the members of Parliament suggested that the veto has limited interpretations, but the precedent is in my estimation dangerous. Our concern must remain with the examples the veto sets. Some of our future governments might prove even less credible than our present predicament. Such governmental ambitions may construe broader applications and definitions in an established veto. We have simpler ways of saying we prefer in certain instances unanimous support.

At the risk of repeating myself, it is to draw attention to a danger that remains within the present proposal for the adoption of the Meech Lake accord is the veto power being granted to the provinces. The veto has the necessary potential of each province to become independent, or balkanized. Every effort should be made to amend the veto to a simple vote and consensus of the majority. Veto powers run completely counter to dialogue. If such is not the case, what power does the veto possess that encouraged even the objecting provinces into the accord?

The federal-provincial conference is slated as a consultation process for proposals. The way this accord has been presented to the Canadian public as binding legislation not subject to amendments and ratification. The whole process has gone over the heads of our elected representatives, both federal and provincial, a substitute provisional government, at a time when Canada has a constituted government.

The cross-country hearings should not be viewed as just a passive exercise, rather the delegations representative of numerous Canadian people should be viewed in terms of either ratification or rejection of the Meech Lake accord and to consider any proposed amendments. All Canadians should reject this instance of the federal government's own veto. In effect, when they refuse any changes, my concern is that it is a veto in itself. This power block approach on the part of the Prime Minister and the Premiers would set a dangerous precedent for succeeding similar legislation.

Decentralization of federal powers seems to have been misconstrued by

Brian Mulroney to mean the dissolution of the federal government to relinquish its responsibility. Good management on the part of our federal government should be a greater commitment and responsibility towards the provincial delegation of authority. In other words, the provinces just delegate their wishes and the government should co-ordinate.

To indiscriminately submit federal programs to the diversity of the provincial whims and conflicting interpretations can lead to competition towards the dissolution of social programs. Antagonisms will arise that will dwarf the "distinct society" issues we are now confronted with. The ensuing parting of provincial ways will in itself lead to the balkanization process.

Equality rights and the distinct society, if we are to go by the definition of the English language and not descend into educated illiteracy, the word "distinct" in conjunction with the word "society" should not be taken to mean the same as individual distinction and rights.

The word "entrenched" means irrevocable and should be construed as such in any dispute. The entrenched Bill of Rights should be above reproach as far as any other legislation, in this case the Meech Lake accord, is concerned. The definition of "distinct society" would come into direct conflict with the antidiscrimination laws in our society. Distinct society is also a complete contradiction of our rights to equality.

Equally important under the review of our constitutional amendments clause, we may have to break new ground in this instance. My concern is that to the best of my review of the various oaths of office our Prime Minister and our members of Parliament pledge to Canada and all Canadians, the word "democracy" is not included within these oaths.

Canada and our western world proclaim to the world our dedication to our democratic form of government. To many Canadians, our maple leaf flag and the beaver will ring hollow without the inclusion of the word "democracy"; nor should democracy be taken for granted. The addition of an amendment is of the utmost concern to include and prominently proclaim in our oath of office the word "democracy."

Mr. Chairman: Thank you very much, Mr. Boychyn, for taking the time to put together your comments. I wonder whether I might start the questioning. With respect to the veto, do you see some needs with respect to certain matters where there would have to be unanimity or do you feel that should not exist on any aspect?

Mr. Boychyn: I see a unanimous choice being preferred, but we have that in the consensus vote. Only when it is arrived at through consensus do I see the democratic process. A simple veto can overrule a majority and, in that instance, it does not apply to a consensus.

Mr. Chairman: You would prefer to see that worked out politically.

Mr. Boychyn: Right. Through dialogue and voluntary support, not intimidated support.

Mr. Allen: Thank you, Mr. Boychyn, for obviously thinking long and hard about the Meech Lake agreement and its problems. I think you have given us a fairly compressed statement of your position on a number of matters.

I was a little bit confused, but perhaps you can help me. At one point

early in your paper, you were suggesting it was extremely important that our constitutional processes bed down on provincial and local governments that are close to people, because that is where the base of democracy lies. Then later on, on page 3, you write: "To indiscriminately submit federal programs to the diversity of provincial whims and conflicting interpretation can lead to competition towards the dissolution of social programs."

That seems to go in the other direction. To say that somehow what comes up out of the provinces, the diversity of the democracy that is there, is going to create chaos in our federal programs. Am I understanding you correctly on both those points? In your mind, is there a contradiction there or have you an explanation for me that would help me hold those two ideas together?

Mr. Boychyn: There does not seem to be sincerity on the part of the federal government to work on the basis of teamwork. If there is not the teamwork necessary between the provinces and the federal government, the diversity that the provinces could create would lead to the chaos I am suggesting here. In that instance, good management on the part of the federal government could conciliate the differences.

Mr. Allen: Again, you would turn to a political solution of conciliation case by case rather than formalizing this process too closely in a document like Meech Lake. Is that your point?

Mr. Boychyn: The federal government, in my estimation, should act as an arbitrator and an adviser to the provinces. In that sense, it would create the teamwork and the spirit necessary to keep a unified Canada.

1020

Mr. Allen: Second, if I read you correctly, you consider the danger that comes from the Meech Lake accord's expansion of provincial roles in federal institutions to be more significant and more dangerous than the "distinct society" clause?

Mr. Boychyn: The provincial government should have input into the federal sector in an advisory capacity and a unifying capacity. From the grass roots up, the wishes of the public would jell in that sense if there was the spirit and the desire on both the federal and provincial governments to work as a team.

Mr. Allen: But you see the Meech Lake arrangements somehow militating against that.

Mr. Boychyn: Yes, I do. The divisiveness of it.

Mr. Allen: You see those aspects as more dangerous than the "distinct society" clause?

Mr. Boychyn: That is right. By far.

Mr. Allen: In that respect, you did note that there were some--did I read you correctly in your second paragraph that there appears to you to be a separatist independent implication in the "distinct society" clause? Is that also your concern?

Mr. Boychyn: If the Canadian Bill of Rights predominates, which I think it should, the distinct society has no meaning, in my estimation.

Mr. Allen: So from your point of view it would really be a kind of interpretative clause rather than something that is very substantial.

Mr. Boychyn: Right, and it does not apply to individuals; it distinctly mentions society. A unifying factor if they so wish.

Mr. Allen: I see. That is interesting. Thank you very much.

Mr. Offer: I would also like to thank you very much for your presentation. To carry on with some of the questions Dr. Allen first brought forward, you talked about the "distinct society" clause in your opinion having really no meaning.

Mr. Boychyn: Yes, if our Bill of Rights predominates and the word "entrenchment" should have the meaning that is intended for it, the Bill of Rights should predominate in all instances and the "distinct society" clause in that instance has no meaning.

Mr. Offer: If that is correct and the "distinct society" provision is merely to be used as identification or interpretation, you would have really no concern with respect to that particular clause? Is that correct?

Mr. Boychyn: No.

Mr. Offer: If that were the case, your statement at the end of page 3 that "Distinct society is also a complete contradiction of our rights of equality" would not hold true because it is just an interpretative matter and could be used as an aid for the courts in determining matters.

Mr. Boychyn: It will still remain as a conflicting type of understanding. It is a conflicting type of understanding. It is up to the courts how they decide, but if we are to take the meaning of the English language seriously, I think the courts would recognize it in its proper context.

Mr. Offer: You are assured in that respect that that is the case?

Mr. Boychyn: I am not sure that the courts will do it, but it is up to us then as democratic citizens to see that the courts do make the interpretations that are meant for it.

Miss Roberts: I would like to clarify two points. With respect to the Senate, you feel that the provincial input is going to be helpful with respect to that?

Mr. Boychyn: I think it is far preferable to the method we have now. To do away with the Senate is a complete different story, but if we are to put up with the Senate, then I would suggest the diversity that would arise from the provincial levels would be of better advantage than the patronage appointments that are made for life.

I would like to recommend that senators be reviewed or not be put in for life. I think they lose some of their aspirations towards Canada as a whole on the basis of a patronage appointment.

Miss Roberts: I note you did not deal with the judges, or not that I recall, with respect to the appointment of judges as well to the Supreme Court of Canada. You have no thoughts on that.

Mr. Boychyn: No; that is out of my area.

Mr. Sterling: Just following along on that, do you not think that by moving the appointments from federal appointments to provincial appointments you are only moving the location of the patronage? I mean, all you are doing is saying, "The federal government can patronize whomever they like in the one instance, and in the other case it will be the provincial government." What is the difference?

Mr. Boychyn: The provincial governments are made up of various parties, and if they put forward candidates for appointment by the federal government, they are putting up diverse candidates. The predominance of one party in the federal cabinet right now would have the tendency to appoint senators from one party rather than from diverse parties. I do not think we have the diversity and the interest if it becomes a one-sided Senate.

Mr. Sterling: The only concern I have, sir, is with our present structure. I was most concerned about the involvement of the Senate with the recent drug bill and its holding up of that piece of legislation for a long period of time, whether you agree with the drug legislation or not.

Mr. Boychyn: Yes, I know.

Mr. Sterling: My concern is that, with the provincial governments appointing or suggesting appointments to the Senate, the senators would then think they had a mandate that they do not have, and that is that they have never been elected by anybody to do that particular job.

So I have a great deal of concern in terms of tinkering with the Senate system without looking at it in an overall context. That is why I would object to the change. I would rather have an impotent Senate, as I think we do now, than have a Senate that thinks it has a mandate, which is what I am afraid this proposal leads to.

Mr. Boychyn: The entrenched identity of this past Senate I cannot be responsible for. My suggestion is that there should be a revision, and that if there is a Senate at all, it be a second opinion, not a commitment on any part, just a second opinion.

Mr. Chairman: Thank you very much, Mr. Boychyn. You have touched on a number of issues. We have your presentation and we appreciate your coming this morning.

I might next call upon Harry Duxtator, the president of the Association of Iroquois and Allied Indians. If you would care to come forward, and any of your colleagues, please come. I might ask you, Mr. Duxtator, if you would be good enough to introduce the others at the table. Then we will turn the floor over to you to make your presentation and we will follow up with questions.

1030

ASSOCIATION OF IROQUOIS AND ALLIED INDIANS

Mr. Duxtator: Thank you. This is Gordon Chrisjohn. He is our tripartite co-ordinator. He works with our association, with the federal-provincial agreements affecting Indian rights on reserves. This is Burt Kewayosh, executive director of the association. We do have some of our members in the audience as well.

First of all, I guess we had better give you a brief explanation of who we are and where we are. We are the Association of Iroquois and Allied Indians. We represent eight first nations in southwestern, southeastern and mid-northern Ontario. That includes, as our name implies, Iroquois and allied Indians, the Ojibway, Mississauga and various other denominations of Indian people in Ontario.

I just wanted to thank the committee for allotting us this time to make a presentation. We are very appreciative of the time you are offering to the native membership in Ontario to voice their concerns with the Meech Lake accord. You have already heard the regional chief of Ontario yesterday, Gordon Peters. Our presentation is basically along the same line, but with the way we feel it affects our organization at this point in time. I believe you have copies of the information. With that, I will just read through it and go from there.

This is the submission of the Association of Iroquois and Allied Indians to the Ontario select committee on Meech Lake, February 18, 1988.

I would like to take this time to thank the committee for allotting us time to voice our concerns about the Meech Lake accord. As you know, my name is Harry Doxtator. I am the president of the Association of Iroquois and Allied Indians. We are an organization of first nations, which are predominantly Iroquois, but our membership includes the Ojibway, Pottawatomi, Mississauga and other aboriginal peoples. As such, we feel it is our duty to present opinions based on a variety of aboriginal outlooks.

Far back in the history of contact with Europeans, the Iroquois people established the principle of each of our nations governing our own people without interference from the other. This principle is expressed in our two-row wampum. As such, we view the Meech Lake accord as a means to unify our government. Nevertheless, we view with concern the potential effect on our governments.

Our long-standing relationship with the crown of England is important to us. Though we have a long history of contact with the people of Ontario, we are given to understand that it is with the federal government of Canada that the crown of England resides, complete with trust responsibilities and pre-Confederation treaty obligations.

Because of this, we are concerned when the accord shifts power away from the federal government, our trustee, to the provinces, who appear to know little of, or care little for, the special considerations to be accorded to us. It will be provincial nominees who will sit on the Supreme Court, often considering the legal interpretation of our rights. The provinces can choose to determine our access to federal social services programming.

The Meech Lake accord recognizes Quebec as a distinct society. We appreciate this and understand it well. We have constitutional recognition of our distinctness. The Penner report on Indian self-government in Canada has provided an impetus to the movement to consolidate and implement our own distinct nationhood, yet the first ministers' conference and this accord have been silent on the subject. Thus, we view the acceptance of Quebec's distinct society, still in an undefined form, as both an example of the unification of your government and a closing of ranks against ours.

The accord would require unanimous consent of all the provinces before the creation of new ones. Aboriginal people in the north, who constitute a

majority, could be prevented from becoming provinces and joining Canada in the same spirit of Confederation as the present provinces.

Provincial opposition to our participation, either as equal provincial partners in Confederation or as self-governing nations with separate jurisdictions, has perplexed us for many years. It is clear that they believe us to be distinct societies, but societies to be assailed. We are instead nations that have been subjected to cultural warfare. We have been kept in poverty; our language and customs have undergone restrictions; our land base has been reduced; our rights have been undermined and the jurisdictions of our governments have been curtailed.

Rather than recognize our rights to resume responsibility for our own people, the provinces have opposed this. This would condemn us to poverty and ignorance. We grope for reasons why the provinces prefer this. Surely there is nothing to fear from a disadvantaged group such as the first nations.

We feel instead that the provinces do not believe in our rights or that they believe far more strongly in the concept of provincial dominance. A clear illustration of this attitude can be seen in Ontario's attitude within the aboriginal fishing issues. Ontario challenges all opposition to its total dominance of this area.

One of our member nations, Batchewana first nation in the area of Sault Ste. Marie, is a signatory to the Robinson Huron treaty, which guarantees the full and free right to fish in our waters. The Constitution of Canada guarantees our rights. Nevertheless, our commercial fishermen are charged by the Ontario Ministry of Natural Resources.

But that is not the end of it. We have won the case. Our rights were recognized by law. The provinces nevertheless appealed the decision. That appeal will be heard next week here in Toronto. We can hope that a victory for the aboriginal point of view there will be sufficient for Ontario. They did not believe in the Robinson Huron treaty, or in the Constitution of Canada, or in the judicial opinion on our rights. They do not seem to believe in any opinion which posits that they are not the sole and absolute voice in the fishing rights issue.

We have tried to negotiate the mechanisms for implementation of our rights to fish. Ontario has refused, citing the opposition of user groups in Ontario. We believe this demonstrates either a lack of intestinal fortitude on the part of the government of Ontario or a fundamental lack of belief in our rights. If the government believed in our rights, or if indeed it were the right of another ethnic group, could the government of Ontario not find the political courage to tell the other groups: "These people have rights. Their rights are theirs, and not subject to your approval or modification."

Is this the point of the Meech Lake accord? Is it intended to recognize the distinct society of only one of the groups contributing to the fabric of the Canadian nation? Is it in many ways a mechanism for the rest of Canada to close ranks against the aboriginal peoples? It can be, but it need not be.

We suggest that there be added to your acceptance of the Meech Lake accord a commitment to further first ministers' conferences on aboriginal rights. Moreover, a policy should be formalized and implemented to include aboriginal representation on first ministers' conferences which deal with the issues that concern aboriginal peoples and their rights. Thus, the Meech Lake accord unifies your government without threatening the establishment of Indian self-government in Canada.

Mr. Chairman: Thank you very much for that presentation. As you noted at the beginning, Chief Peters was here yesterday. There are a number of organizations that will be appearing before us, but I think, as I say, that repetition does not hurt on some of the fundamentals in terms of helping us understand the views you have.

Mr. Doxtator: Yes.

Mr. Breaugh: I just wanted to pursue basically one area of discussion with you this morning. We had a federal joint committee make a recommendation about a first ministers' conference in 1990 to deal with aboriginal rights. Yesterday Chief Peters said he thought that was a good idea and that, in fact, aboriginal people could put together the structures, the examples for self-government by that time. A number of other people have suggested that there are outstanding issues before the courts, and those decisions will be reached by that time.

In my most reasonable mode, which does not always come about, it seems to me that we have before us an opportunity here that consensus may emerge, that other decisions may be made, so that some time between now and a date in 1990 the first ministers of this country could in fact sit down and do what they ought to have done many years ago: if not come to a final solution on aboriginal rights, at least get it onto the final track.

I must tell you I find that a very attractive proposal to kind of get behind. The problem I have with it is that if we lose--if that does not work, if the Meech Lake accord goes into effect without some such process being at least identified, never mind a final solution--it appears to me that we put a lot of people at a severe disadvantage and that we may have lost the final opportunity.

Now, I suppose you cannot get absolute about this. Nobody has lost the opportunity to go to court, for example. Nobody has lost the opportunity to use political clout, for example. Maybe we have had enough first ministers' conferences on aboriginal rights to tell us it is worth one more shot, but not much more than that.

I would be interested in hearing your position on whether that is an option which we should try to exercise and how fruitful it might be.

1040

Mr. Doxtator: As a representative of the first nations that I represent, I believe we would certainly welcome the opportunity for the joint committee's recommendations to be approved by the federal government and possibly supported by this committee here in that their restoration-- In order to come up with the positions and papers required, it certainly does require some financial considerations, and those are one the primaries that we would have to be looking at in order to prepare our documentation for that.

As far as the first ministers' conference in 1990 is concerned, I can support that as well. We have, as you have made us aware, been through five years of it from 1980 on until the spring of last year. In 1990, if the proper financial resources are available to us, we can provide that information for the first ministers. With regard to having a one-shot deal at it, that is definitely a possibility. The first ministers and the Prime Minister are the people who call those meetings on behalf of whatever the agenda might be at that point, but we certainly would welcome an opportunity, I believe, to reinstitute our agenda as aboriginal peoples in Canada.

Mr. Breaugh: Let me just give you one final little question, and you touched on it. One of the vexing things--and I will use last year's conference as an example--is that a number of people I know who have worked for a long time on this pretty complicated problem thought they had learned enough about the process, made enough contacts, understood what a first ministers' conference was like, how it functioned and the kind of power schemes that flow through it, that they really felt they could go to a conference of this nature and make their case, that they were getting close to, if not equal footing, being competitive in that league. I use that sports analogy.

The concern I have is that we have tried this approach on a number of occasions. As an outside observer, I would say that what happened was that we let groups come in who were unfamiliar with the process, a totally foreign process, to them, of the first ministers' conference, who had not done battle with the bureaucrats in quite this way before. They had certainly battled bureaucracies for a long time, but they had never seen the full army in dress uniform with its new nuclear weapons out there.

How fair is it to say that we will pin our hopes on a first ministers' conference, that format, and that we will try to let aboriginal groups from across the country come and address the issue in a forum which is not theirs? To turn it around, if we said, for example, that all of the federal bureaucrats will leave the conference rooms in Ottawa and we will go to a reserve somewhere, we will speak a language which is neither English nor French, we will use a format that you have never seen before in your life, and we will not even tell you who the power brokers are on this reserve; you will have to find that out after you get there, the bureaucrats would scream, "This is horribly unfair, this is wrong, this deprives us of our constitutional rights, this is just awful." And yet we have done that to our aboriginal peoples repeatedly.

Mr. Duxtator: That is right, yes.

Mr. Breaugh: Give me some idea of whether you think you can in fact use the first ministers' conference as a reasonable forum to present your case.

Mr. Duxtator: I think that the first ministers' conference is basically one of the highest courts in the land. That is where the decisions are made on behalf of the Canadian people. Of course, there is a Supreme Court of Canada above that, but I think the first ministers of this land are the area where we have to present our case. We, as aboriginal people, as you have indicated, are in a foreign setting in that particular situation, but I believe that our people have come a long way education-wise and politically. Some of our political leadership has gained some very good political street smarts for the politicians in this country.

I would say it is probably unfair to us. Yes, I would tend to agree with the analogy that you put to us with regard to taking the MPs and the premiers to a reserve somewhere and using our language. Just as they would claim that is unfair, I would have to claim that as well at this time. But I do have a lot of respect for our political Indian leadership at this point. We know our case, and I feel we can present it to the people concerned. It is just that for some reason they are not listening. We have been at it for five years, and they are just not listening to our comments and making rational decisions on those comments we are making. I think, if it was possible, it would be a good idea to get these fellows out on the land as we have been for years and years.

Mr. Breaugh: I just have this vision of a first ministers' conference being held somewhere in the middle of the Ontario wilderness--

Mr. Duxtator: On our land.

Mr. Breaugh: Yes--where some are comfortable and some are not. I wonder how the chief bureaucrats would do without access to their computers and eight million staff people and the hotel suites. It might be interesting.

Mr. Duxtator: I do not know.

Mr. Chairman: An interesting thought. I have Mr. Allen with a supplementary, then Mr. Cordiano, Miss Roberts and Mr. Offer.

Mr. Allen: Just a brief supplementary on that. I think in the course of my colleague's questioning there was at least an implication that there were possibly other routes that might be available to you other than going the route of the first ministers' conferences. I think it is important for this committee to have your sense as to whether in fact there are other routes. The courts are obviously one. But, that to one side, if we do not manage and no one manages to secure an amendment to the first ministers' agenda which specifically includes you in that agenda for subsequent meetings, are you then bereft of further access to process, or are there other ways?

One of the problems of the patriation of the Constitution, I guess, was that it reduced the access to the British Parliament, which might have been another ally in the process. But, as you indicate yourself, that is now totally established within federal domain. Does the federal government have unilateral powers that you could prevail upon, for example, to force the issue? What are the alternatives?

Mr. Duxtator: I guess it would be again up to the Indian leadership of the country to continue to promote our concerns with the general public of Canada. If our ideas could be promoted strongly enough and we had enough support--election time is always a good time to get some support--we could get these people moving in our ways. Barring that, there is always the international forum, I guess, and we have taken steps in that area already.

As long as there is an Indian concern and we are here, there will be a process whereby we will continue to promote our concern and make sure, hopefully, that the people of Canada hear us. We will always be there to make our presentations as aboriginal people of this land.

Mr. Allen: All those roads lead back to getting on to the agenda.

Mr. Duxtator: Right.

Mr. Allen: If it comes later, why not now? That is the question.

Mr. Duxtator: Right.

Mr. Cordiano: I want to touch very briefly on a point following up on what Mr. Breaugh had to say, just for my own clarification.

There is, as you know, a provision in the Meech Lake accord for annual first ministers' conferences; I believe there should be one held this year prior to the end of the year and, proceeding on that, each year. I am just wondering if these conferences are the best means by which you can make your case as aboriginal peoples, as native peoples. Or do you think that conferences on aboriginal rights are the appropriate mechanism?

I am trying to understand how you would make your case known. Essentially, we have a new process in effect here. For the first time, we are recognizing that we are going to have annual constitutional conferences. Is that something that you foresee as useful and beneficial to you? Each year, if you can envisage this, people will be making their case to the first ministers, who of course are going to set an agenda to discuss issues. We are trying to grapple with the whole process question and what we can do to enhance that if we are called upon as a provincial Legislature to intervene somewhere in that process.

Mr. Doxtator: Just to reference the previous question, we have to get back to the aboriginal agenda, certainly, in order for the first ministers at this conference to hear us. As for the yearly conferences they are proposing at this time, it would be my suggestion that if there are agenda items that we feel would be affecting our lives in Ontario or in Canada, then we would certainly want the opportunity to be part of those first ministers' conferences to address that particular issue at that time. I believe at the yearly conferences they will be calling there will be a maximum of two to three agenda items or something along that line.

Mr. Cordiano: Right.

Mr. Doxtator: If those agenda items did not have a direct effect upon us, then certainly the first ministers probably could go ahead and have their meeting, but we would want the opportunity on agenda items that would affect Indians living on reserve.

Mr. Cordiano: To deal with aboriginal rights then, perhaps you would have to have one agenda item for that particular year. In the past we have had first ministers' conferences which dealt exclusively with aboriginal rights.

Mr. Doxtator: As a package.

Mr. Cordiano: Right. Because we now have annual conferences, I am just wondering if, in addition to the annual conference meeting, we are going to have additional aboriginal rights conferences.

Mr. Doxtator: We certainly would promote the idea of aboriginal rights conferences just to keep our ideas forward. But as far as Meech Lake is concerned, just to reiterate Mr. Peters's presentation yesterday, there are five items that we, as Indian people in Ontario, must stress. I will just review those quickly at this point.

They are: (1) constitutional recognition as self-governing first nations; (2) review of the constitutional process for the unfinished aboriginal agenda; (3) a guarantee of protection for first nations against the opting-out provision for national programs; (4) removal of the unanimity requirement for establishment of new provinces; and (5) a guarantee of aboriginal participation in other first ministers' conferences on issues which directly affect us.

That last one is basically the area we are discussing right now.

Mr. Eves: I am actually just going to follow up with sort of a supplementary to Mr. Cordiano's question. If I understand you correctly, there are basically two things you would like to see with respect to the future in your pursuit of self-government. You would be happy if this committee somehow could recommend that future first ministers' conferences with respect to

aboriginal self-government be guaranteed and that if any further first ministers' conferences, as they are laid out in the accord, deal with items or issues that affect your people, you would want to be recognized and able to attend at the bargaining table.

Mr. Doxtator: Those two items, certainly. Our bottom line would be the amendment to the Meech Lake accord to include those things that I have just mentioned.

Miss Roberts: I would like to thank you for making such a positive presentation. You have given us good, substantive things to think about as to what might be helpful and how we can approach your particular concern with respect to Meech Lake.

One thing I would like to just bring to the fore again is the fact that you suggested not only that you be at the table or put on the agenda at the first ministers' conference, but also that there be more active participation in the political process on the provincial level prior to going to that first ministers' conference. I think that is a positive way of viewing that; you are extremely well versed and very political and are aware that the more people you have behind you, the better.

I would like to just say to you that you are progressing in educating the rest of us Canadians about your particular place in Canada, which as far as I have been able to see right now is as a result of treaties made a long time ago, and as you have indicated, there is a trust situation between yourself and Ottawa. I want to encourage you to keep on with that education because I am one of those people who need to be educated.

I would also like to ask you if you can indicate to the committee what your greatest fear is as a result of the Meech Lake accord itself. Is it the fact that they have set out the agenda for the first ministers' conference? Is that the one that sets you back the most?

Mr. Doxtator: I think the biggest concern I have with Meech Lake is the fact that a distinct society has been recognized. We have been trying for years and years, and most predominantly in the last five years with the first ministers' conferences, to educate the first ministers of this land about our distinct nationhood within this country. The fact is that it seemed to have gone on behind closed doors, away from the public or whatever, and in 19 hours they came up with the recognition of a distinct society. My own most personal fear of the Meech Lake accord is that we are not recognized by the first ministers in this land.

Miss Roberts: But you do not wish to be a distinct society, because you already are distinct nations within.

Mr. Doxtator: Right. We would like those people to recognize that.

Mr. Offer: In 1982, there was a commitment in the charter for participation in a constitutional conference. That took place in 1987. It was a failure. There was no agreement reached. I would imagine it is an understatement to say there was disappointment, despair and most likely some anger involved. When that happened, there was also no provision for any further meetings. I believe that is correct. When that conference ended without agreement in 1987, the obligation in the 1982 agreement had been met, I would imagine, and there was no further opportunity in the future for meeting apart from what you would have to do, as you very well know would have to be done, in order to try to force a meeting.

The question I am asking is this: With the accord now and the constitutionalization of these first ministers' conferences--and I think in response to Dr. Allen's question, you said you thought these particular conferences would be an effective forum to bring forth your concerns--is the mere fact that we now have this Langevin agreement with the first ministers' conference again opening the door for further first ministers' conferences on aboriginal rights?

Mr. Duxtator: Is that your question?

Mr. Offer: Yes.

1100

Mr. Duxtator: I guess it is not opening the door for the discussion of aboriginal rights, but because of the agenda items that are included--one of the first meetings includes fishing as a topic, and as aboriginal people of this land we feel we have a distinct interest in that particular issue of fishing. As I mentioned in the presentation, the Ontario Ministry of Natural Resources has a continual habit of arresting our commercial fishermen, and we do have a distinct interest in that particular issue. We feel that when fishing is a topic that the first ministers are going to discuss, we should be part of that or at least have representation at the table on behalf of the aboriginal peoples in Ontario and across Canada, because the fishing issue is nationwide; British Columbia commercial fishermen are having problems, and people in the Atlantic are having problems in fishing areas.

I think as far as the agenda items that come up because of the Meech Lake constitutional conferences are concerned, I think we would have a forum there if those first ministers would recognize us and give us the opportunity to be part of that.

As far as future meetings are concerned, as you have indicated, when the first ministers' conference in the spring of 1987 ended in failure, there was not a commitment for future meetings other than the Prime Minister's statement that there may be a meeting at some time in the future. He did make a statement to that effect, but there is no guarantee. The year 1990 has been mentioned. The year 1997 has a review of the Constitution at that point, and I think at that point there probably should be some aboriginal concerns.

We have been part of the discussion regarding the constitutional discussions in years past, so I think in the review of the Constitution in 1997, there will be an opportunity for aboriginal participation at that time as well. However, we do not want to wait that long. We need to clarify our positions with the first ministers at this time.

Mr. Offer: I think that is an extremely important point, that you do not want to wait that long, until 1997, as you have so clearly indicated.

I recognize the fact that it is not specifically put in as an agenda item with respect to the initial first ministers' conference, but I would like to comment that there are now going to be those first ministers' conferences, so I would think an argument could be made that there is the forum for this particular matter of such great importance to be put on an agenda, whereas there was no specific forum when the 1987 meeting was over.

I would just like to get your comments with respect to your view that the mere fact of section whatever it is in the Langevin agreement does

possibly permit your particular matter to be brought on prior to 1997 and prior to some commitment or some statement made; it is now in the Constitution.

Mr. Duxtator: You said "possibly could include," and that is the problem we have. That is why we are saying if this committee could recommend an amendment to Meech Lake which would definitely put that in there so that we would have an opportunity to present--

Mr. Chairman: Mr. Morin, you will be the last speaker.

Mr. Morin: My preamble is going to be very short. We hear the expression "self-government" used very frequently. I hear all kinds of definitions. How would you describe "self-government" for the native peoples?

Mr. Duxtator: Self-government to me is a ways and means that we would have the opportunity to have the jurisdictional authority and control of our people on our lands. That is basically what we are looking for. Right now, the Indian Act, through the Department of Indian Affairs and Northern Development, keeps us on a leash type thing, holds us back and holds us down.

We are asking the federal government and the premiers to recognize the fact that we are an aboriginal people and we did have our forms of government years ago. We would like that opportunity now to have jurisdiction, as I say, over our people on our lands. To me, that is self-government of our people.

Mr. Morin: Does it mean that all the native people, all the nations, all the reserves, all the treaties would join together and form one nation? How would you--

Mr. Duxtator: I think we have to appreciate the fact that just within our own organization we have the Iroquois, we have the Ojibway, the Mississauga, the Pottawatomi. In some areas, depending on the geographic location, that could be a possibility, I suppose.

But I think you have to realize that there are different cultural backgrounds, even though we are basically lumped in as Indian native people in this land. We do have our own separate cultural areas that we come from. To respect that, we are saying that I, as an Oneida nation member, would like the opportunity to have jurisdiction over my Oneida nation people at home.

As far as pulling it all together as one group--

Mr. Morin: But still part of all the other provinces and everything, still part of a whole nation?

Mr. Duxtator: I am not clear on what you are saying.

Mr. Morin: What I am saying is that we hear all kinds of things, for instance, that the native people want to secede, want to go on their own and forget about the rest of Canada. I hope it is--

Mr. Duxtator: No, my interpretation is that once the first ministers of this land recognize the fact that we do have the right to self-government, to jurisdictional control over our people, we have to co-operate. You are in this land, we have been in this land, the federal government is here. As I mentioned previously, financing and resources are the prime concern of any government.

As Indian government persons, we would want the opportunity to

co-operate with the provincial government, with the federal government, with funding agencies, in order to ensure that we can do the best governing for our people at that time. So there has to be co-operation, I guess, to negotiate our fair share of the resources in this land, our land.

Mr. Allen: I know we are running a little bit behind time, but I think it is very important for the committee to get its head around on this question. As I understand the practical proposals that that would issue in, it would mean, you would progressively take on jurisdiction over, for example, the delivery of education, the delivery of children's welfare services, the delivery of pensions and seniors' programs and nursing homes.

Is that practically what you are speaking of, that over time, those would all come together under the jurisdiction of native peoples, perhaps in a contractual relationship initially with the provincial or the federal government, depending on the level of government concern?

Mr. Duxtator: As long as we had the opportunity to have the control of those areas, that is basically what we are saying, yes.

Mr. Chairman: Thank you very much, Mr. Duxtator, to you and your colleagues. I think particularly the points you have made in answer to these last few questions with respect to the issue of self-government have been very helpful. We thank you for coming this morning.

Mr. Duxtator: Thank you to the committee.

Mr. Chairman: I will ask the representatives for the Citizens for Public Justice to come forward to the table. Perhaps I might ask Mr. Olthuis, the legal adviser and research director, if he would introduce his colleagues or whoever is here.

1110

CITIZENS FOR PUBLIC JUSTICE

Mr. Carrick: I am Wayne Carrick, the secretary of the executive committee of Citizens for Public Justice, Ontario, the Ontario division of CPJ. On my immediate right is Gerald Vandezande, the public affairs director of CPJ, who will speak on behalf of the national level of CPJ and say a bit more about the organization. On my far right is John Olthuis, the research director of CPJ and a lawyer.

Since these two are staff of CPJ, I am here from the membership to say that this submission does have the backing of the 3,000 members and supporters of CPJ in Ontario and the 2,000 outside of Ontario. A description of CPJ is in appendix A of the written submission. In Ontario we are working for more just policies in several areas. We have been heavily involved in one of the advisory committees of the Social Assistance Review Committee. Also, we have been working with a number of native organizations in Ontario, as well as in Canada, in their struggle for recognition and self-government.

Mr. Vandezande: My name is Gerald Vandezande. The national organization of Citizens for Public Justice, since 1963, has been essentially concerned with constitutional rights and the nature of pluralism. It has made a number of major submissions to the federal government, as well as the provincial governments, particularly as the rights of the native peoples are affected.

My colleague John Olthuis, who will be speaking later, has been involved particularly during the constitutional talks, as an adviser to the Dene nation and the Assembly of First Nations. We also made submissions with respect to pluralism and constitutional questions involving the Canadian Human Rights Code and have had a series of submissions to the federal Department of Justice, as well as to the Canadian Radio-television and Telecommunications Commission regarding broadcast policy.

For us the key issue is that, in a democratic society, we do justice to the diverse faith and value orientations of all Canadians and that Canadians, through their communities, institutions and organizations, be given appropriate opportunity, in law and in actual practice, to express these values and views. We elaborate further on that in our submission.

Mr. Olthuis: My name is John Olthuis and I am the research director of CPJ, as has been indicated. You have our brief before you. What I would like to do is summarize for maybe seven to 10 minutes, with the hope that for the rest of the time we can engage in a dialogue.

Basically, we have two recommendations to make. The first is that your committee recommend that the assembly refuse to ratify the accord, unless there are five significant amendments. Those amendments ought to deal with: First, inclusion of aboriginal nations as distinct societies in section 2; second, protection for social program standards from the possible negative effects of the opting-out clause; third, protection of all charter rights from possible legal interpretations of the "distinct society" provisions; fourth, provisions to ensure greater pluralism and protection of minority rights, both in an individual and group sense, in our Constitution; fifth, removal of the veto power that all provinces and the federal government now have over key constitutional amendments, such as the creation of new provinces.

In the second place, we recommend that Ontario appoint a special independent commission, similar to the Social Assistance Review Committee, to gather and report to the assembly and to the people of Ontario and Canada on ways in which we can ensure--and we are talking legal and political ways we can ensure--a more diverse and pluralistic Ontario. There are many differences in our society, differences of language, religion, creed, socioeconomic world view and culture. We all need to work together to ensure that those differences build rather than retard the emergence of a pluralistic and dynamic society. We are recommending this morning that Ontario takes the lead in doing that by the appointment of a special commission.

I have some brief comments with respect to our first recommendation. We are asking you to recommend that the assembly not ratify this Meech Lake accord. We have two problems: One is with the process that led to its passage and the other is with a number of substantive problems in its provisions. It began as a good process: Let us get Quebec as a more active participant in the Constitution. It turned into a power play, in which each province grabbed for itself additional powers in return for granting special status to Quebec. Minorities, aboriginal people, charter rights, equality rights, all these things were jeopardized because of this power grab. We find this reprehensible in a democratic society.

We are also concerned about the Premier (Mr. Peterson) saying to your committee, "Look, go ahead and hold your hearings, but I am not going to make any changes." We are asking this morning that the Premier reconsider that and have an open mind about improving this accord. We salute the inclusion of Quebec as a distinct society, as most Canadians do, but this accord could have

done much more. Many more things could have been added to it to provide justice for additional people. We are concerned about the excuses that have been given for not going into additional areas. We think that they are excuses and that what was lacking here is the political will to move ahead to extend rights to other people.

Let me deal with some of those excuses, such as the one about aboriginal rights. You have heard about that. Mr. Dostator was just discussing that with you, as did Chief Peters yesterday. There is absolutely no reason why aboriginal rights could not have been included in section 2. Aboriginal nations are founding peoples. Our first peoples should be recognized in that section along with the other founding nations.

We are told that could not be done because in the definition, Quebec's rights, for example, are already in section 93 of the Constitution and provincial rights and native rights are not. That may be true, but there are many clauses in the Constitution that require additional definition. The most fundamental of those is section 2 of the charter which, in a fundamental way, says that laws in this country are to be judged on the basis of whether they are fair and reasonable in a democratic society. The courts decide that.

The section on opting out on social programs has many words that are going to end up being interpreted by the court: "programs," "initiatives," "compatible with," and so on. The problem is not with the process. We are suggesting that aboriginal first rights conferences be again put into the Constitution. We are suggesting that there be conferences. The problem is not the process. The problem is that the premiers and the Prime Minister come to these conferences not to implement the recognition of rights that there are in the Constitution; they come to narrow and take back what the Constitution has done. We are very concerned about that.

No matter what process you invent, unless the governments go to the table with the commitment to implement aboriginal rights, we are not going to get the extension of aboriginal rights in a true sense, namely, self-government for our first peoples in all of its context. We are recommending that that can and ought to be done. We suggest in our amendment section how it can be done.

With respect to charter rights, we are told--and the committee in Ottawa dealt with this extensively--"Look, the 'distinct society' clause does not give new powers; it is an interpretative clause." I think that is right because the fear, as you all know, is that it might be another section 93 of the Constitution under which the courts would say, "Look, this gives Quebec the right to discriminate, regardless of the clauses in the Constitution."

I agree that the "distinct society" clause is an interpretative clause, but if the courts reach the second phase of looking at whether a law is in accord with the charter and ask the question, "Is it reasonable and demonstrably justified in a democratic society?" they are now going to be faced with the additional question, that is, in the case of Quebec in a free and democratic and distinct society, there is an additional question there.

The courts are going to have to take that into account, and it is possible in so doing, they will say: "Look, the words 'distinct society' justify certain restrictions on charter rights that would not be justified if we just had the words 'in a free and democratic society' as apply in other situations." We are very concerned about that.

1120

When it comes to social programs, there is a reason, of course, why a number of the provinces fought so hard not to have the original wording included in Meech Lake. The original wording was that social programs, if a province opted out, had to "comply with national standards." That would ensure across the country equality of the standard of social programs to all citizens.

The present words are fraught with difficulty, "a program or initiative that is compatible with the national objectives." Those words are going to end up in the courts. Provinces not only want those words to design additional programs but also they want those words in order, possibly, to give substandard services in certain areas of the country. We are very concerned about that. We suggest amendments that we think are compatible. These things are all compatible with recognizing Quebec. Why not do them all at the same time as we recognize Quebec?

Finally, a few comments on our second recommendation, that is, the establishment of a commission to look at ways in which Ontario can move ahead to entrench for citizens not only in Ontario but also across the country a greater degree of pluralism. We applaud the accord for the contribution it has made to opening up the discussion on differences and for the fact that differences can be handled in creative ways. You can say Quebec is a distinct society and count that as something that will contribute to a dynamic society, not as something that will divide. We laud that.

The key question now, I think, is whether we will move towards a greater degree of pluralism for other minorities or whether other minorities will be treated as individuals with multicultural rights. In that connection, we are very concerned if, by multiculturalism, we are going to mean in Canada what is contained in Bill C-93, which was introduced in the federal Parliament, An Act for the Preservation and Enhancement of Multiculturalism in Canada.

We are concerned with its contents because what it basically does is give some individuals cultural rights, the right to express themselves. It basically says to native peoples, for example, "We welcome and encourage your costumes and your head-dresses at the Olympics." Pluralism says, "And we accord to you the right that you have to self-government." That is the basic difference between multiculturalism and pluralism.

We want to fight for pluralism not multiculturalism, which simply encourages ethnic contributions in the way of a special ethnic heritage. We want that but we want more. We want pluralism that truly accords to aboriginal people their basic rights, institutional rights and collective rights, and those rights for other minorities as well. We believe the way to start this in a constructive way is for a special commission to be appointed by the government of Ontario to go about Ontario asking people about how to deal with differences. We have a number of suggestions here.

First, we think the SARC model in some ways is a good model for a commission to go around and solicit views. We believe the committee should have: members from diverse groups across Ontario, as appointed by those groups, not appointed by the government; advisory councils like the SARC councils; adequate funding for participation of groups; informal hearings across Ontario; and that the committee should look at how other societies have dealt in a more positive way with differences so that differences can come to contribute to the growth of a dynamic society.

We are very concerned about this and we think Ontario could lead the way

in saying: "Hey, towards the next steps in the constitutional process, if we are going to have new rounds, let the rounds be positive rounds to give additional rights. Let us not go off in the direction of a narrow multiculturalism. Let us continue to move in a direction of pluralism for more groups and societies."

Ontario does have a veto power, of course, on the accord. Every province does. We urge you to use that power to improve this accord. That is what we are saying. The accord can be approved in ways that do not jeopardize the significant recognition of Quebec, and if you do so, we think that history will judge the accord more favourably. It will say it not only recognized Quebec but did so in the context of also extending rights to other people. Otherwise, we have the danger that it will be judged by saying, "It gave Quebec a distinct role; but in the process it eroded charter rights, it ignored and eroded the rights of aboriginal peoples, it contributed to reducing social standards" and so on. We do not want to see that and we respectfully urge your committee to make the kinds of bold recommendations that will enhance a significant step in Canadian democracy.

Mr. Chairman: Thank you very much for raising some issues, again, that we have not had put before us. I found particularly challenging your concept of pluralism in multiculturalism. I am sure we will want to explore that. We will begin with Miss Roberts.

Miss Roberts: Thank you very much, gentlemen. I do appreciate the comments you have made and your positive attitude towards what we can to help the process, but I would like to ask you to define it just a bit more, if you could.

To me, there are two processes. One is the process that is set up with the first ministers' conferences, and that is going to go on from year to year. But I also have the feeling that if we are going to amend the Constitution, there should be a certain process that we go through as a nation, not just meetings of first ministers on a yearly basis. Maybe we can look at a process that leads us towards the amendment of the Constitution. Do you understand what I am saying?

Mr. Olthuis: Yes, indeed.

Miss Roberts: Each year they can get together and talk about whatever they want to talk about--the Senate and fisheries. OK? But they cannot amend the Constitution unless this process has taken place, whatever that process might be. What you are suggesting as part of that process is an independent commission here in Ontario. Can you suggest anything else that might help develop a process that made it mandatory that there be some national consensus on when we are going to amend the Constitution and on the steps to get to that amendment?

Mr. Olthuis: That is a difficult question, of course. To start with, we do firmly believe that the participation of people is crucial. In other words, it has to begin in each province with the government, and we are suggesting that in Ontario it be the commission, gathering opinions and formulating, probably in its own Legislative Assembly, a position.

Miss Roberts: OK. So your next step is to the Legislative Assembly.

Mr. Olthuis: I would think so. It seems very odd that in the most fundamental things in this country, the Legislatures are not involved, either

in terms of knowing what position provinces are going to present at the table or in having a report back after the first ministers' conference in any comprehensive way. We are talking here about very fundamental things.

The commission, we believe, is one route to that. We also think the present conferences ought to be opened up. For example, we have grave concern about what happened in the Ottawa proceedings, where Georges Erasmus, the president of the Assembly of First Nations, said: "You are having a conference on fisheries. This is the mainstay of native life. We should be represented." The committee's conclusion on that was, "Oh, well, native people will be represented there by their Premiers and by the Prime Minister, like all Canadians." There is a preconceived notion there of how we are going to settle these things that we are very concerned about.

It is not just a process question. It is a question of the commitment of the provinces to go into those conferences actually to extend and pluralize rather than to hold on to their powers, and that process has to begin also at a very fundamental level with the people of Ontario and in the Legislature.

1130

Miss Roberts: The whole idea behind the process, though, I would assume, is not to stop the development and evolution of Canada as a confederation. Is that not correct? Twenty years ago if you had talked about pluralism--you know, your particular concept--no one would have listened to you. So the important thing about the Constitution is to allow it to be living. It is going to grow and, indeed, there is no particular way that the Meech Lake accord is going to stop that. Everyone agrees that this process ??is not the process that should be used to amend our Constitution.

Mr. Olthuis: We would say that a mature democracy should embrace pluralism. A mature democracy not only has room for difference but should cherish difference, and it should support the institutional expression of difference. Native people are one example. Native nations can contribute a great deal to our common understanding of how to live in the society. We should embrace that, not attempt to erode those rights and reduce them to individual rights. We think that applies to other minorities as well. We are a mature democracy now. We ought to move towards pluralism, not multiculturalism in that reduced sense.

Miss Roberts: You think the Meech Lake accord stops you.

Mr. Chairman: Mr. Vandezande just want to add a comment.

Mr. Vandezande: Just one comment. I think the experience we have had since 1982, and to take a specific cause, is that native people's rights were recognized for the first time in the Canadian Constitution. But over the last five years we have discovered that those rights do not mean all that much, because the provincial governments, together with the federal government, have allowed the process to be abused so as not to do justice to the very rights that were guaranteed in the Constitution. As we heard this morning, the process has come to an end. Unless the provinces--Ontario, for example--or the federal government take a creative initiative, there will be no further discussions with the native peoples, whose rights were included in the Constitution.

In my view, they should have had co-decisive powers as to how Meech Lake would deal with their rights, if their constitutional rights meant anything to

begin with in 1982. But the very fact that their co-decisive powers--which were implicitly and, to a degree, explicitly recognized in the 1982 document--have now been ignored shows that there is no democratic process.

What needs to be done, in my view, is that when fundamental interpretations or rewrites of the Constitution occur, before the first ministers can even reach agreement on that, perhaps they can say, "We adopt this in principle: (a) subject to the proper examination by the Ontario and territorial assemblies; (b) subject, where necessary, when it affects the rights of the native people, to their consent; and (c) there might have to be a national referendum on some of these basic questions, because you deal with the life of the nation and the peoples of the nation. For 12 people to get together and say, "We cannot afford to deal with their concerns at this point," is a travesty of justice and a violation of democracy. It goes against anything that the United Nations Charter talks about. We cannot be pretending to be piously subscribing to the Charter of the United Nations when it comes to South Africa and rightly condemning apartheid in South Africa but practising it at home by not giving native people the right to participate in the entrenchment of their own rights.

Mr. Allen: I want to thank Citizens for Public Justice for a very substantial brief, which is at once critical and constructive, and for a very articulate and incisive summary for us to work with.

I guess first of all I would again like to address the question of the commission. At first I thought perhaps this is another opportunity to discuss multiculturalism in the same old terms. We all know where that would go, and it would do us no good at all.

First of all, I guess I would like you perhaps to expand in a little bit more detail on what you mean. This is an interesting notion to me, that pluralism means something different from multiculturalism, that it really does entail the vesting of dignity and full proprietary roles, if you like, in groups in our community with respect to the important decisions that affect them. Therefore, you are talking not just about things that are folkloric; you are talking about economic entitlements of newly arrived Canadians, you are talking about participatory roles in the way in which multicultural and linguistic groups and varieties express themselves in the public education system and a whole host of items like that which are very tangible and solid and involving on an ongoing basis.

That is my first question, whether there is a bit more precision you can give us there. Perhaps I have hinted at some of the things it means precisely for me, or could mean for me.

Secondly, are you proposing this as something that would really extend what the premiers began to do when they included section 16 in the Meech Lake accord? They at least bowed slightly in the direction of statements that already existed in the Constitution with regard to multicultural rights as a way of saying: "Well, we really meant something more than just making a bow at that point. We are meeting in Ontario. It just has to take a tangible form of working towards some realization of something more that does not presently exist in that language." How does this relate to the section 16 stuff and what happened politically around that?

Mr. Olthuis: Section 16, I think, was an afterthought to the accord. Native people were not involved at all in the accord. Section 16 also refers to multiculturalism. At best, what it does is prevent the erosion of

multicultural rights. It prevents perhaps the erosion of aboriginal rights, although that is not clear either, because those rights are now going to be interpreted within the context of the dual society, linguistic duality clause. So it will have an impact, I think, on multicultural rights, a slight but negative impact, when we should be going in the other direction.

We do deal with the concept of pluralism in the brief at page 8. I will not go through that, but perhaps the simplest and shortest way of describing what we are talking about is by reference to the bill that was introduced in the House of Commons. I am quoting from ??section 313. This is the section that talks about what the policy of the government of Canada is, and that is, ?? "To ensure that all individuals receive equal treatment and equal protection under the law while respecting and valuing their diversity." We think it is key, and this is the key difference between multiculturalism, which is in this clause, and pluralism, which would say, "Ensure that all individuals and communities receive equal treatment." We are talking about collective as well as individual rights. We are talking about institutional expression of differences, not just cultural expression of differences.

Mr. Morin: On page 8 you mention, "Group actions such as setting up different school systems or creating distinct institutions to express and practise different economic, environmental and cultural beliefs should be allowed." Could you expand on that?

1140

Mr. Olthuis: Yes. We think that in a mature society we ought to recognize and encourage people with different values and concepts to express those in the fullest possible way. In other words, take the education system. We believe there ought to be freedom for a variety of people to set up education systems, provided they meet certain basic educational standards and so on, and those would all be public systems of education in the sense that different individuals would have the right to choose which public education system they would attend. Native people would have the full right to say: "Look, we have a different world view, and that world view has to come to expression in the way we educate our children, so we want a particular kind of education for our children. It will meet government standards, but it will allow us to introduce our children to our own way of life in the way we want." We should not be afraid of that in a democratic society.

Mr. Morin: What about economic, environmental and cultural beliefs? What do you mean by that?

Mr. Olthuis: That is somewhat more difficult in terms of giving shape to that. When you have, for example, a community--and we have often had this in Canadian society, particularly with native people--where a traditional way of life is very much tied in with spirituality and culture and so on, that is a belief that leads to a certain relationship to the land, certain traditional hunting, fishing, trapping and so on. That is a set of beliefs.

Our society says, "We need that land to cut the trees down to sell the lumber to the United States." There is a clash of cultural values here. Who says that trees as economic objects, rather than as spiritual or cultural gifts from the Creator, are more important? So we are saying we have to recognize that our beliefs in a capitalist society ought not to be so dominant that they do not allow for the expression of alternative beliefs such as those native people have. Why not say, "Indeed, your beliefs are very important, so we are not going to cut your trees down, because boy, this is a great stand of

lumber"? We are going to say: "Yes, in your culture it is very important, and we understand that. That is your right in our society." That is the direction we are moving in, Mr. Morin.

Mr. Morin: And you mean that this would apply to all sects, for instance, who would want to form their own group, think the way they want, establish themselves in their own environment?

Mr. Olthuis: Not in the ghettoizing way that your comment suggests. We say there are those differences in our society. We all know about them, and they are healthy. My goodness, it is healthy. When you and I have differences, maybe, in our exchange, I listen to you, you listen to me. But let us accord each other in the society the right to say, "Yes, you have the right to develop your beliefs if they do not interfere with mine; I have the same right, and together we can build this different, dynamic society," instead of going in the direction of forcing a blandness or a sameness on our society in which creativity and distinctiveness are discouraged. We say let us encourage it, let us embrace it, let us say this is good for our society and does not threaten the fabric of democracy, it enhances it. It puts more threads in the weave of society. That is what we are saying. It is not trying to create something artificial. It is saying that we have these differences in society. How can we creatively provide political and legal protections for them?

Mr. Vandezande: Just a couple of examples. Bill 30, which was passed by this Legislature, is a concrete example of doing justice to a particular faith and value community in respect to educational rights. We think that equal protection should be extended to the Jewish community and should not be discriminated against. But in terms of economic and environmental rights, there are worker co-ops and housing co-ops in our province that think differently about how to run business enterprises and how to develop good neighbourhoods.

If anything, a government that is sensitive to these human values that people are putting forward and want to practise should encourage the emergence of those groups and, through tax incentives, grants and other ways, make it possible for such co-ops to make their particular contribution to the economic, social and cultural situation in Ontario. It could do that by cutting out the huge grants, subsidies and tax favours that are being given to the multinationals and by going out of its way to stimulate communal local participation in the economy on a nonprofit basis. That would be one example of doing justice to the plurality of values that people have with respect to the environment, the economy, business, education and you name it.

Mr. Chairman: We will go back to Mr. Allen. I am conscious of the time, so after Mr. Allen we will have Mr. Eves and Mr. Cordiano. At that point we will have to move on to our next group.

Mr. Allen: I will resist asking a question about some problems in values at the level of pluralism. Obviously, there has to be a hierarchy of values in some sense; otherwise, one ends up with the proponents from the Fraser Institute telling us that their values are equal to everybody else's, and the right to private profit can enter into conflict quite legitimately with community interest and more communitarian values. What I see your commission doing is wrestling with some of those fundamental things of hierarchy of value as well, that relates to the pluralistic process.

What I want to come back to are your comments about standards and objectives in shared-cost programs. I am a little puzzled about this whole

discussion. There seems to be an implication that "standards" is better because it is a tighter word. It is more explicit with respect to what the federal government could mandate across the board for the provinces.

Let us suppose, however, that one has a federal government that does not want to mandate very much--I think one does not have to look very far to find one--and it lays down, as standards that have to be required of the provinces, terms that are very minimal and that cannot be exceeded in order to qualify for funding for social programs. Does one then want provinces to be bound by the limitations of standards? I am coming at the question from the opposite end, obviously: not a government that will require maximum participation in well-thought-out public processes, nonprofit, etc., programming across the board, but one that would be very limited.

You have got provinces, on the other hand, that have limited resources but want to get in on programs that are progressive, want to expand them but have not got the money to afford them and are limited by the federal government's definition of "standards" and what it will fund in what they can do in a province. That is not an unhistorical observation, because we know that some of the more progressive programs that have evolved for Canada nationally have come from provincial initiatives.

Could you run your head across that one and see where you come out on it? It seems to me it is a possible scenario and it could tie us down on the standards side in much the same way that you do not want to be tied down on the objectives side.

Mr. Olthuis: The concern we have with "objectives" is, for example, that the national objective might be to relieve poverty. That would leave each province to say, "Well, indeed, we are relieving poverty." It is not too farfetched to say that a particular province might say: "We are relieving poverty by giving a huge grant to a private company with the hope that it will create jobs. That is our way of relieving poverty."

We think that is a real concern, particularly with the problems that the free free trade agreement is going to put on the taxing of corporations. In other words, social programs are going to suffer because of less revenue. By national standards, we are talking about the level of assistance that Canadian citizens across the country are entitled to. We happen to think that ought to be a charter right, so to speak. Life, liberty and security of the person ought to say, "Look, each person who is unemployed or cannot work for a certain reason has a right to a certain level."

1150

So by "standards" we mean we would think that there ought to be an actual level that a province would have to meet in terms of its welfare payments before it would qualify for federal funding when it opts out of a shared-cost program. If that basic level is high enough, then provinces, of course, would be encouraged to go beyond it, but it would at least ensure a minimum standard of actual dollars delivered in programs across the country. That is what we would like to see ensured in the amendment.

Mr. Vandezande: The Canada assistance plan, which was adopted over 20 years ago, has as its goal the elimination of poverty. Everyone has agreed to it until this day, but it does not contain standards, for example, that all Canadians should be entitled to an adequate income that meets the poverty line levels of Statistics Canada, so governments can continue to say our social

assistance and programs are trying to meet that objective. If you incorporate in the Canada assistance plan that the social assistance programs must at least meet the poverty line levels of Statistics Canada, you would have a standard to which we could hold Ontario accountable, which we will be doing this afternoon. Currently, they can just get away with saying, "Well, we are trying."

Mr. Allen: You would build on the kind of thing the Canada Health Act asks for--

Mr. Vandezande: Correct.

Mr. Allen: --where it is universal, accessible, etc. That was a very helpful answer. Thank you very much.

Mr. Eves: I will try to be as brief as possible, Mr. Chairman, and perhaps I will make just a few comments as much as asking a question.

I think your suggestions with respect to the process are rather innovative and interesting, and I am sure the committee will take those into account in its deliberations. You are asking for quite a few amendments to the accord and, being somewhat of a realist, quite frankly, although I may sympathize with many of them, I do not hold out much hope that you are going to achieve, in reality, everything that you desire.

However, I think there are a couple of areas where you at least have a chance of being successful. One is the entrenchment of all rights and freedoms under the charter. We have heard from many different groups, but they all seem to come down to the same thing, I think. That is that, because there is ambiguity laid out by certain sections of the charter--and which ones take precedence over others--I would think a fairly clear way to eliminate that ambiguity is to make a very simple, all-encompassing amendment which says that the rights and freedoms of all Canadians as established under the charter take precedence over the Meech Lake accord. Would you agree with that?

Mr. Olthuis: Yes. That is very close to the amendment we suggest, which is "nothing in section 2 abrogates or derogates from the rights and freedoms set out in the Canadian Charter of Rights and Freedoms."

Mr. Eves: Surely there is not one of the 11 first ministers who could disagree with that, seeing that they keep on telling us that was their intent all along.

Mr. Olthuis: Indeed.

Mr. Eves: I am sure there is not one of the 11 who would disagree with that. I do not know why that cannot be achieved in five minutes or less.

I think that perhaps the ultimate insult, though, under this document is the section that talks about future conferences and the agenda items that will be covered in the future, and I would think that the ultimate insult to the aboriginal people of this country is that such items as Senate reform and fisheries take precedence over their rights and their discussion on self-government.

Mr. Olthuis: I certainly agree with that, Mr. Eves.

Mr. Chairman: Gentlemen, thank you very much for coming before us

this morning and presenting your brief. As I mentioned before, there are a number of very innovative ideas which I think are going to spark a lot of thought and reflection among the committee members, and we very much appreciate your taking the time to work out those thoughts and ideas and talk with us this morning. Thank you.

Mr. Vandezande: Thank you.

Mr. Chairman: I now call upon the representatives of the Metro Action Committee on Public Violence against Women and Children and ask Pat Marshall, the executive director, to come forward. We apologize for running a little bit behind, but I think you will appreciate that that happens at the end of the morning and the end of the afternoon.

METRO ACTION COMMITTEE ON PUBLIC VIOLENCE AGAINST WOMEN AND CHILDREN

Ms. Marshall: I certainly appreciate the opportunity to be here. Does that mean that we can continue?

Mr. Chairman: Oh, yes, we will go forward.

Ms. Marshall: Until--

Mr. Chairman: And you have--

Ms. Marshall: Five minutes?

Mr. Chairman: Yes, right.

Ms. Marshall: I can talk very quickly.

Mr. Breaugh: The guy is just doing his job.

Mr. Chairman: We will certainly have the time. We have received a copy of the submission, and if you would like to speak to that first of all, then we can follow up with questions.

Ms. Marshall: Yes, I would. I am here representing the Metro Action Committee on Public Violence against Women and Children, and we are an organization implemented by Metro Toronto council in 1984 to be a catalyst for the implementation of some fairly far-reaching recommendations dealing with violence.

As we are working to increase the understanding of the nature of violence in our society and its pervasiveness, to improve the response of society to sexual assault survivors, to challenge the high tolerance of sexual violence that we have in our society and, of course, in the end, to reduce the actual levels of violence, we have some very grave concerns about the implications of the Meech Lake accord for the right of women and children to live lives free from violence and also to receive redress through the criminal justice system when this right is violated.

We are working with urban planners, with police, with medical and legal professionals, with educators, violence survivors, community organizations and three levels of government in a wide variety of policy and law reform initiatives, support service development and public education. A lot of work we do is with the police on the development of education programs to improve their response to sexual assault survivors.

In our work we use section 15 of the charter in a very practical way, and that is the focus I want to bring to you today, because I think it is incredibly important in the deliberations you are now in the process of. That wording, "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination," is our measure, our yardstick that we hold up to our criminal justice system when we are assessing its response to sexual assault survivors.

Sexual assault is probably the most underreported major crime in our country. The majority of women who do not report it cite as their major reason for nonreporting mistrust of the criminal justice system. They at once perceive that they will not receive equal benefit and protection of the law, and with one in four women in Canada, by conservative estimates, being subject to a sexual assault at some time in her life and that level of underreporting, we are talking about a large number of women not receiving, at the very first instance, the benefits that could be conferred by section 15.

Then for those who do report sexual assault and go through that criminal justice system, the benefits may still be very elusive. For somebody who has been through an assault and then goes through the humiliating, painful process of reliving the trauma, telling that story, not in her words but in responses dictated by defence counsel's questions, to a roomful of strangers and then seeing an acquittal of her assaulter, you can imagine that the results are absolutely devastating.

In one case we are dealing with now, police testified that they found the woman in a fetal position, mumbling incoherently, but the court in that case did not understand that that is very indicative of a sexual assault. Rather, taken with all the trappings of the middle class standing of the accused, that accused was acquitted and the devastation for that woman continues.

1200

I bring to you a particular concern because it looks like those acquittals may increase. In Ontario we have been very concerned about the overextension of resources of our crown attorneys and the inability, often, to match the preparation time that would allow an equal benefit of the law in the trial process. When our Attorney General (Mr. Scott) told members of our organization within the past two weeks that at this point it would probably be only a 15-minute pre-trial interview a crown attorney could have with a sexual assault victim, our concerns increased. That is not enough time to gather and prepare adequately for a trial. Therefore, access to justice at that very fundamental level seems to be being withdrawn as we speak. Sexual assault cases certainly take more preparation than that.

Then, as we move into a system, even when an assaulter is found guilty and there is clear evidence that that crime took place, we have no guarantee that the judge understands the nature of the crime or its impact on the victim. In fact, in the research we have been undertaking in our organization, we see a wide discrepancy between judicial understanding of sexual assault and women's own experience of the assault.

There is an inherent violence in sexual violation that is just not being understood in the way it is with other violent crimes. Only in a minority of sexual assaults is there actual physical coercion or the use of a weapon. That is necessary only in cases where an assailant must overpower a victim. In the majority of cases, through either position of authority, size or threatening

language, the assailant already has power over the victim and does not need those other things. Yet in case after case, as I have submitted to you, there is this focus on the absence of this other violence which militates against sentence.

So a judge can say, after a stepdaughter has been raped three times over a two-month period, that there was no violence; in another case, with forced sexual intercourse 12 or 13 times against a 14-year-old daughter, that there is no allegation he used physical force or violence; in another case, forced sexual intercourse and indecently assaulting a daughter 500 times and attempted forced sexual intercourse against a niece, that there is no physical coercion. That level of misunderstanding is of considerable concern for us.

Sometimes we note that the tolerance of sexual violence takes another form. Judges use euphemisms. A sexual assault is called a misstep. Another one involving young daughters is called an exaggerated paramedical examination by the father. In another one, sexual abuse of young farm hands, six of them, the judge said, "This man was caught up in the spirit of boyish horseplay." Those euphemisms and then the resulting sentence, which often correlates with the level of excusing--such comments as "to err is human" about a social worker sexually abusing are just not acceptable in our society.

In another area that we are very concerned about, judges profoundly underestimate the impact of sexual assault. Although studies and our own experience with survivors tell us that women are profoundly affected by sexual assault--in one study, more than one in five women who were raped attempted suicide and more than twice that number seriously considered it--we have judges saying again and again: "There is no lasting and permanent damage to the complainant. The injuries were minimal." Even if she passed out in the course of the rape: "There is no threat or use of force. The victim was not hurt in any way, has not suffered any lasting damage." Sexually assaulted a stepdaughter for an eight-year period, "There is no evidence of lasting impact on the children," etc. Those kinds of comments show that people in those cases are not receiving equal benefit of the law.

In other cases, we have a judge's concern for the accused overshadowing any of his expressions of outrage or concern for deterrence, so disproportionate weight is given to mitigating factors: employment, the accused's grade 12 report card, monetary loss, marital problems, sexual dysfunction, good citizenry. Law school is named as rehabilitation in one case for a very long history of sexual abuse. There is this focus of concern that somehow this assault was out of character, when no research supports that conclusion that middle-class assaulters are very different from other assaulters. Men who rape are found in all social, educational and professional categories, and our work on sexual abuse of women by health professionals certainly emphasizes this fact.

As we set the promise of the charter against the reality I have just described to you, I hope it makes quite clear how vulnerable and how fragile are women's rights to justice at the hands of the law. Achieving equal treatment now guaranteed under section 15 of the charter will not be an easy matter.

Mary Eberts has described some of the onerous tests that are in place. There is a tradition, for example, of resistance to judicial education, which would be the obvious remedy for the kinds of misunderstandings that I have described to you today.

Composition of the bench in Ontario: I am sure you have seen some of

those figures and statistics. Even more recently, the criteria for judicial appointments that have been put forward by the Canadian Bar Association reflect little sense of being influenced yet by sections 15 and 28 of the charter. The criteria are generosity, patience, sympathy, charity, good work, high moral character, experience in the law, intellectual and judgemental ability and good health--period, full stop. No criteria there about any demonstrated understanding of equality issues.

That is with the charter as it is now. With the strongest charter in place, we still are having difficulty achieving equality. I certainly do not believe that one needs a legal opinion to understand the impact of clause 16 of the Meech Lake accord. It says: "Nothing in section 2 of the Constitution Act, 1867, affects sections 25 or 27 of the Canadian Charter of Rights and Freedoms."

That language seems so clear that even my 16-year-old daughter, when she read it, was fairly clear about what it meant. The aboriginal and multicultural rights are not affected by the new linguistic duality and "distinct society" provisions. I might add and comment, as our last speakers have, that multicultural rights, we hear again and again, without clear protections from discrimination, may be very hollow as they are described there.

If clause 16 had been omitted, there may still have been a controversy over the effect of the accord on the charter, but by singling out those two provisions for special protection, we have now a hierarchy of rights and freedoms, some rights seen more clearly now, more equal than others, and we cannot afford that.

We have been told by the federal politicians: "Trust us. It is OK. The rest of the charter is not affected," or "The rest of the charter is affected, but it will not be a problem for you." With respect, that is when we find those legal opinions helpful, which tells us that politicians' words have no weight in legal interpretation.

They have also reminded us that the equality provisions have not been interpreted by the Supreme Court of Canada and now, therefore, we must look forward to an interpretation heavily weighted by the wording of the accord, and that is our great concern.

In large part, I do not have to remind you, it was equality-seeking groups that gave this government of Ontario its mandate. Many of the initiatives have been welcomed, but this accord is causing us great concern. We have such a distressing but clear window on the inequality of Canadians and the difficult challenges that equality-seekers face across the nation. We have learned to appreciate, therefore, the potential and the value of the charter and see the Meech Lake accord putting those rights and freedoms at risk.

Premier Peterson's sense of an accessible government has been evidenced in many ways, but in signing this accord, which will have such impact, he was party to a process that could not have been less accessible to us as Canadians.

1210

In listening to Premier Vander Zalm's rather chilling response to the recent Supreme Court of Canada decision, I really felt that was being made in the spirit of the Meech Lake accord. That is the kind of thing we will now be able to expect; and it is just not good enough. We have in this province such

a proud tradition of national leadership and of making decisions that will benefit all Canadians. At this point, just focusing on the issues that I am now, equality-seekers across the nation need our help, and of course there are so many others you have been hearing about.

In order to achieve the one goal, the Meech Lake accord has jeopardized so much for so many. We can and must balance the rights of Quebec with those of violence survivors, the disabled, the elderly, the visible minorities and the women of Canada. The accord must be amended to protect all the provisions of the charter or, at the very least, the equality provisions of the charter.

Of course, this process must be improved, as we all shudder, I think, at the prospect of annual constitutional grab-bag meetings and having to deal with the fallout of those. The process by which we arrive at constitutional reform must also be looked at. The implications of what you are doing are far-reaching, and I do not envy you your challenge. I welcome the fact that you have the opportunity to have this input. We are very concerned about the recent statements of Premier Peterson in support of an unamended accord. I hope that with some very strong recommendations, you will be able to convince him that this is not in the interests of the people of Ontario.

I wish you well in your deliberations and would be happy to answer any questions.

Mr. Chairman: Thank you very much for setting out very clearly the views of your organization and for providing examples in a very difficult area to reflect the concerns you have with the accord.

Mr. Breaugh: I want to put a couple of basic questions to you. We are struggling with the notion of how we can best establish, as clearly as we can, that the charter remains supreme and that rights which were gained so short a time ago are not taken away by this accord. We are struggling with how to do that. We have had several people suggest that a reference may establish that.

Frankly, the problem I have with almost anything other than a Supreme Court decision on the matter is that it does leave you vulnerable, in that the first ministers will meet again and again. This year, they have decided that equality rights are important, so they should be reinforced, but next year that will not be so important.

I think the case is emphasized by your submission this morning, where you kind of do your case-by-case submission of the current attitudes. Through a recent experience of my own, I am sadly aware that when one talks to the Law Society of Upper Canada and the benchers, maybe they are not quite perfect. They certainly do not take kindly to such comments, and it is not an easy task. They believe very firmly that they are fair and honourable, and I believe they are trying. We are not talking about intentions here; we are talking about current practices and how to change those. The charter is a very valuable tool.

For example, in many communities, the type of program you run would not be looked on as being the favourite thing to do on a Tuesday evening. Maybe something else is a little more socially acceptable. You are often challenging the local legal establishment as to how it carries on the business of running the court system. If you do not have something substantive like a Charter of Rights to back you up, they are all going to say: "That never happens here." We don't have that kind of problem. There's nobody like that in our community."

I am concerned, frankly, that we find the mechanism that establishes in the most powerful way that the Charter of Rights, which we just received and are just beginning to use, is not diminished by this Meech Lake accord. I would appreciate your comments on what has been proposed to us by a number of eminent constitutional experts now, that the way to do that is to try to put together a reference to the Supreme Court and to get a Supreme Court decision on the matter.

Ms. Marshall: A reference is certainly something we have discussed, and at many levels it is very appealing. I think there are many risks involved with a reference in terms of the time line, in terms of the wording of the question, in terms of what it says, but I think it is something that I would like to see discussed more fully. We have certainly looked at that and have talked a lot about that.

Ideally, of course, if one provincial government is very clear that this accord at this point, without amendment, is not acceptable, then we can delay in that way. I guess that is the option we would ask you to look at first: Can this province do that?

We are just intervening in a Supreme Court of Canada decision--actually, it is one of the first ones on section 15--in two weeks. The thought of an intervention with the 10 attorneys general coming in as interveners and the process is a little mind-boggling just in terms of what that is going to look like.

Mr. Breaugh: At least they would have to do it in public this time.

Ms. Marshall: Yes, they would, and that would be a welcome change.

I guess in this deliberation, there will be stages at which other decisions are made, and I think maybe this is a little early for that one. Even whether you can have an open vote in the Legislature, it is my understanding, has not been agreed upon. If that option is closed off, then I think the reference looks much more likely.

Mr. Breaugh: Let me put to you just quickly a second concern that I have. If someone is able to convince me that we can find a technique that establishes the validity of the charter, and it is unchallenged by Meech Lake and all of that, much of what others have criticized in this accord diminishes.

For example, I am not really concerned about what any of the provincial governments would do in the way of establishing equivalent programs or things like that--there is a lot of advantage in that--if I am assured that nobody has lost any of his equality provisions.

On the other hand, to give you the reverse of that, if we are unsure that we have maintained what we already have in the Charter of Rights and we float off to the provincial level all the provision of services that might come with that, it does not take me long to get to the position to see where, if Premier Vander Zalm or Premier Devine takes a different attitude towards a program like yours, someone in one of those provinces will want to argue, "Whether you like it or not, I have a right under the law in Canada to establish such kinds of programs, to deal in these areas, which nobody else in my community thinks is popular." It may not be as popular in many parts of Canada to set up a program such as yours as it is in downtown Toronto, and that is a fact of life that I recognize.

If I get the one thing, which is to establish that there is no impact of

a significant nature on the Charter of Rights by Meech Lake, I am prepared to let some of these other things ride, because it may happen in an awkward way; people will have to kind of dig in their heels and insist on their rights for funding. If you do not get the assurance that the charter is supreme or relatively unaffected by that, then I would be more concerned than I am right now with things that other people have brought out about programs such as yours, about the attitudes of courts, about sentences that are given and things like that. I would like to get your response on that.

Ms. Marshall: I think we are very concerned about the vague wording about the cost-shared programs, the word "compatible," without some clear definition. I think the clear definition can be added, though. I do not think that is an insurmountable problem; it could be clarified with some very clear criteria. But I would agree with you that if the charter is not supreme as the measure, the stick, that we are holding up to all these processes and initiatives and responses to our equality-seeking groups, then we are in trouble, and in more trouble.

1220

Mr. Offer: From your last comment, it is very clear that the basic issue is how and whether section 15 is affected in any way, shape or form by the Langevin agreement. I am sure you have heard, and I want to get your comment with respect to what we have heard from some other eminent constitutional experts, that section 15 and section 28 are what might be referred to as rights-giving sections, whereas section 2 of the agreement and section 25 and section 27 are interpretative sections and, as such, will be used only as an aid by the particular court at whatever level in interpreting particular questions. I would like to get your comment in dealing with the distinction between what we have heard are sections dealing with rights, which section 15 clearly is, and other sections which are merely interpretative, such as sections 2, 25 and 27.

Ms. Marshall: I have heard quite a bit of dispute about what you are now talking about, and I am sure you have too, that the process that has been used to date, I think, the section 1 process of determining what is a reasonable limitation, would be looking at the charter as a whole. Certainly, in the cases we have seen before, I do not feel much consolation from that kind of suggestion. There is nothing in place that I know of that shows that is how the court will process the charter as it is making the constitutional decisions.

I think we are in an area such that, because that process has not been been gone through yet at the Supreme Court of Canada level around the interpretation of section 15, for example, we do not even know what the steps are going to be in those deliberations. I just do not feel very assured by that kind of interpretation and I know that others are not either.

Mr. Offer: Your response brings out--and I think Dr. Allen yesterday touched upon it, just as you have--the fact that in dealing with matters brought to the court's attention, or whatever, you are not going to look at one particular section, you are going to look at a number of sections. You are going to keep in mind all of the sections.

I think that is right and I think that is what you have just indicated, but I think it is also a fair comment to say that, with respect to those sections, there is a clear difference in the wording in dealing with sections that are rights and sections that are matters of interpretation. I understand

what you are saying, "Well, we just are not absolutely certain," but we have been given representation to show that section 15 is clearly a rights-giving section and section 2 of the agreement, for instance, is clearly an interpretative section.

I just say that as comment. If you wish to respond to that--

Ms. Marshall: There is a whole history in 1981-82 that I think shows it is just not as clear as that in terms of the process of developing the charter. I believe there are two versions of what happened around the table in terms of the inclusion of clause 16: (1) that it was for the reasons that you have suggested and (2) that we got to aboriginal and multicultural and we did not ever remember equality-seeking groups. I guess there is still nothing that fills--

Mr. Breaugh: This is the kind of scenario that makes you feel good.

Ms. Marshall: Well, look at the composition of who is around the table. We do not have a strong commitment to equality that comes through on an absolutely consistent basis yet in this country. I tried to give you some examples of how we are living our lives. I think that second scenario is equally possible and must be considered. That was a very rushed process. You know the pressures that were involved in terms of the locked door and those men who were there. They were not going to be allowed out. It is not a very comforting process.

Mr. Sterling: I am intrigued by the arguments that are going on here and the pretence that politicians are, in fact, in favour of section 15, particularly in this Legislative Assembly, because when Bill 30 came up for debate in this Legislature, there was one member, and you are looking at him, who took the position that section 15 should outstrip every other section in the Constitution of Canada.

I do not know why groups come here without drawing the conclusion that our Premier, who strongly supported the discriminatory aspect of Bill 30, as was stated clearly in the Supreme Court of Canada, that it was a discrimination that was sanctioned by this Legislative Assembly, why groups come here and expect that these politicians are going to take equality of all people across Ontario and Canada over special interest groups that may or may not exist now or may be created in the Constitution, as it appears there may be, particularly with regard to the "distinct society" section.

I get angry when I hear the arguments flow forward in terms of everybody talking about section 15, particularly in this Legislative Assembly, when nobody wanted to put that argument forward when we were talking about Bill 30 and discriminating in favour of one religious group to the detriment of all others. The Supreme Court said, in retrospect, after we discriminated here of our own free will, that we had that right to discriminate.

As I hear more and more groups come forward, I come more and more to the conclusion that there should be a straightforward section within the Constitution, that section 15 is the priority. When you are dealing with justice issues and when you are dealing with making choices in law and in society, you have to prioritize.

Ms. Marshall: We did try in 1982 when section 28 was given special status. There was certainly a request that section 15 be included at that time.

Mr. Sterling: Do you think it is realistic to even think that our

Premier or the other premiers and the Prime Minister are going to overlook individual interests, be they provincial, religious, or one or the other? Do you think that any of them will come to the conclusion that the equality section has to be paramount? Do you think it is realistic in terms of our history of Ontario with regard to Bill 30?

Ms. Marshall: Yes. Bill 30 is one part of our history in Ontario, but there have been a number of other equality-based initiatives that I think give me some optimism that there is some room for movement, change and recognition that that is necessary. I come to you with some level of optimism in spite of the kind of work I am doing, because we are seeing changes. But we are also right now under the most incredible threat, certainly that I can remember, in terms of the impact of this unamended accord. There is nothing else that has happened in the history of my work over the decade that I can remember ever feeling this level of fear and terror about.

Mr. Chairman: Miss Roberts has a short supplementary.

Miss Roberts: One of the reasons you have the fear and the terror is because of the lack of judicial interpretation of section 15, and there is a matter of timing that we are looking at; not necessarily the accord itself but a matter of timing.

Mr. Elliot: Could I have a short supplementary, Mr. Chairman?

Mr. Chairman: A short, short supplementary.

Mr. Elliot: I would like to thank you very much for your frankness and the optimism you bring with your presentation to a very serious matter, which we have to address somehow in our society.

What I would like to do, because you are a Metro action committee, is to ask you just briefly, if you will, to give us some idea of how a Metro committee like this could to best advantage keep the Ontario Legislature apprised of its concerns on a continuous basis, because I think the kinds of things we are beginning to talk about here are long-haul kinds of things with respect to the fulfilment of your wishes. I think we all aspire to do that, but how would you best be able to keep us advised of your concerns on a continuous basis?

Ms. Marshall: As I said, we met with the Attorney General two weeks ago to respond to the report of the Ontario Courts Inquiry by the Honourable Thomas Zuber. We are meeting soon with the Minister of Labour (Mr. Sorbara). We have a fairly strong consultative network with the province, certainly a considerable amount of it through the justice section of the Ontario women's directorate, and work co-operatively with the province to achieve, I hope, some mutual goals.

Beyond that, we try to respond to as many public education initiatives as we possibly can and do a lot of work just with the media in terms of the understanding of these issues and the interpretation of these issues. I would certainly welcome other suggestions from you if you have them.

Mr. Elliot: Do you think that up until now you have been listened to as you have expressed your concern?

Ms. Marshall: We have been very careful because we have come into this situation with very minimal power. What we have is knowledge and

Carefully documented research. I think we have maintained, to the best of our ability, a level of credibility. That has seemed to bring a considerably high level of consultation by the three levels of government with us.

Mr. Chairman: Thank you very much again for coming this morning and for your most thoughtful presentation. We appreciate it.

Ms. Marshall: Thank you so much. Good luck.

Mr. Chairman: Just one short note to the committee members. There will be four, not five, presentations this afternoon. Leslie Smith will be at 3:30, not at four. We are adjourned until two o'clock.

The committee recessed at 12:33 p.m.

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SELECT COMMITTEE ON CONSTITUTIONAL REFORM

1987 CONSTITUTIONAL ACCORD

THURSDAY, FEBRUARY 18, 1988

Afternoon Sitting

Draft Transcript

SELECT COMMITTEE ON CONSTITUTIONAL REFORM

CHAIRMAN: Beer, Charles (York North L)

VICE-CHAIRMAN: Roberts, Marietta L. D. (Elgin L)

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Breaugh, Michael J. (Oshawa NDP)

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Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

Substitution:

Sterling, Norman W. (Carleton PC) for Mr. Harris

Clerk: Deller, Deborah

Staff:

Bedford, David, Research Officer, Legislative Research Service

Witnesses:

Individual Presentation:

Gillis, Deborah

From the Voice of Women:

Macpherson, Kay, Executive Member

Carr, Betsy, Executive Member

Gilchrist, Madeleine, Executive Member

From the Union of Ontario Indians:

Miskokomon, Chief R. K. (Joe), Grand Council Chief, Anishinabek Nation

Individual Presentation:

Smith, Leslie

LEGISLATIVE ASSEMBLY OF ONTARIO
SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, February 18, 1988

The committee resumed at 2:09 p.m. in room 151.

1987 CONSTITUTIONAL ACCORD
(continued)

Mr. Chairman: I call the afternoon session to order and invite Deborah Gillis to come to the stand. We welcome you this afternoon. Perhaps I will simply turn the microphone over to you. We have received a copy of your paper. If you would like to proceed and present your views, then we will have an opportunity to ask some questions.

DEBORAH GILLIS

Ms. Gillis: Thank you, Mr. Chairman. I am very happy to have the opportunity to present my views to you. I hope you will find them useful.

The argument I am going to pursue concerning the political significance of the Meech Lake accord rests on the premise that the document ushers in a new era of federal-provincial relations which can be seen to alter the balance of federalism in favour of a quasi-intrastate union. The 1980s have been historically significant for the proliferation of constitutional changes the decade has seen. All of these changes have been the result of ongoing federal-provincial conflict.

It has been generally accepted that the Canadian Charter of Rights and Freedoms was promoted by the federal government not only as a means of ensuring the protection of fundamental human rights in Canada but also to bring about national unity. This historic document was not signed by the province of Quebec upon its adoption in 1982, thereby diminishing much of its potential for national integration. Thus, the concern for bringing Quebec into the constitutional fold emerges, creating the political impetus that allowed for success at Meech Lake.

The document has been criticized in many quarters for its diffusion of power from the centre to the peripheries. The cry has been, "Who will speak for Canada?" alleging that the primary effect of the 1987 constitutional amendment will be to decrease the power of the central government, creating a country which is the ultimate community of communities. My paper will illustrate that the provisions outlined at Meech Lake will act to strengthen the federal government in relation to the provinces by allowing Canada to move towards a climate characterized by increased interprovincial harmony.

The background to my paper sets out what I call the structural constraints that the original constitutional document placed on national unity in this country. For time's sake, I am going to summarize what I have in the background to the paper. I have argued that when the Fathers of Confederations came together in 1867, they united two conflicting principles when they wrote the Constitution, those being federalism and parliamentary government.

It has been argued that the most fundamental aspect of a federal country is the degree to which the interests of regional governments are represented in the central government. That is the underlying principle of federalism. On the other hand, parliamentary government came to us from the British model, which operated under a unitary system where there was no need to take regional interests into account. What we see when we look at the provisions of the Constitution outlined in 1867 is that those elements which relate to parliamentary government acted to diffuse the ability of the government to allow for regional representation within the central government.

There are two different forms that a federal country can take. One is intrastate federalism and the other is interstate federalism, which I refer to on the fourth page of my brief.

Intrastate federalism is characterized by the accommodation of regional interests within the institutions of central government. The emphasis here is that there is a potential for conflict in the overlapping of governmental jurisdiction and that this conflict can be avoided not just by separating the powers of the two levels of government but also by allowing for the representation of those interests within the institutions of central government. On the other hand, interstate federalism rests on the premise that jurisdictional control of the federal and provincial governments can be sufficiently separated as to avoid conflict.

What we see in the Constitution Act, 1867, is that elements of interstate federalism were clearly put into place with sections 91 and 92 of the Constitution, but the elements of intrastate federalism were not as clearly put into effect. The reasons for this were the problems suffered by the Senate because it has lacked legitimacy, because it is an appointed body by the federal government. Each of the provinces was not given equal representation in the Senate.

Other problems are the party system and how it operates in the House. Members of the cabinet and individual members of Parliament, although they are representatives of the provinces, are not able to bring the views of their regions to the government because they have to follow the party line, which is necessary to keep the parliamentary system running. The problem is there has been an inability of regional representation within the central government.

When we turn to the 1987 constitutional accord, we see that in the period preceding the Quebec referendum, members of the federal cabinet appealed to the people of Quebec to vote against sovereignty-association, promising that they would bring about constitutional renewal which would alter the balance of federal-provincial relations. The response in Quebec was a resounding yes to Canada, but when that constitutional reform came about, it came not in renewed federal-provincial relations but in the Charter of Rights and Freedoms and a domestic amending formula.

It had been accepted that the charter would act to bring about national integration, but what this assumption failed to recognize was that national disunity was not just a result of a lack of effective symbolism in Canada but of the tensions created by the constant conflict between the federal and provincial governments.

When the first ministers met at Meech Lake in March 1987, they met to discuss the conditions under which Quebec would agree to join the constitutional fold. Thus, although the participants at Meech Lake were there primarily to discuss the demands of Quebec, the first ministers must be

applauded for their tenacity in forging a deal which is favourable to all Canadians.

My argument is that the constitutional reform was, and continues to be, necessary in Canada to overcome the obstacles placed on national unity by the dynamics of interstate federalism. My support for the Constitution amendment of 1987 rests on the premise that it alters the balance of federal-provincial relations in Canada in favour of a system that can be called quasi-intrastate.

An examination of the objectives and provisions of the Meech Lake accord lends evidence to this hypothesis. What one finds is a movement away from classical interstate federalism to a system of increased intergovernmental consultation in areas which have traditionally been the sole responsibility of the federal government. In the preamble to the 1987 constitutional accord, we see the commitment of the governments of this country to create a Canada which is characterized by "the principle of the equality of the provinces, which would provide new arrangements to foster greater harmony and co-operation between the government of Canada and the provinces."

The Honourable Lowell Murray, in a presentation before the special joint committee of the Senate and the House of Commons on the constitutional accord, reaffirmed these sentiments when he outlined three objectives which would be achieved through the accord. Senator Murray maintained that these objectives were: "recognition of Canada's diversity and linguistic duality; respect for the principle of equality of the provinces; and promotion of co-operation and collaboration among governments."

Elsewhere, he states: "The accord confirms the principle of the equality of the provinces. The accord strengthens the legitimacy of national institutions by giving all provinces a role in the appointments to key national institutions, and it puts in place intergovernmental mechanisms and ground rules to co-ordinate economic policies and pursue constitutional renewal. This is what the accord has achieved--a creative, dynamic process that will place a premium on seeking consensus."

In my estimation, these statements are crucial to an understanding of the Meech Lake accord. The onus for national unity is on intergovernmental negotiation, resulting in this movement to a quasi-intrastate federalism. I qualify the use of the term "intrastate" because Meech Lake does not create regional representation in all institutions of government, and where it does so, it will take a number of years for the effects to be felt in the political system. Yet what has been achieved is a movement in this direction, which is perhaps best illustrated by the provision for future constitutional discussion on Senate reform.

It is this overall tone of the agreement which sets the climate for reduced regional conflict. Central to this movement towards intrastate federalism is the equality of the provinces, thus establishing what I would call the twin pillars of the constitutional accord of 1987. These pillars are reflected in a trend towards intrastate federalism based on equal accommodation of each of the provinces.

Following from this line of reasoning, I must express my discomfort with clause 2(1)(b) of the Meech Lake accord, which affirms "the recognition that Quebec constitutes within Canada a distinct society." This is coupled with an equal uneasiness with section 3, which affirms the corresponding "role of the Legislature and government of Quebec to preserve and promote the distinct society of Quebec."

I see this provision as being contrary to the goals and objectives of the Meech Lake accord, as already documented. These sections clearly give Quebec a special place in the Canadian Constitution which is not afforded to the rest of the provinces. In the words of the special joint committee on the 1987 constitutional accord: "These principles"--that is, duality and distinct society--"are more than merely preamble. They must in future be taken into account by the courts, along with the other rules of interpretation, in arriving at a balanced understanding of the whole of our Constitution, including the charter."

From this, the claim that the "distinct society" clause will have no meaning, nor give any special power to Quebec must be discredited. The more likely scenario is that Quebec will be given an additional outlet by which to override the charter, by establishing that specific legislation can be "justified in a free and democratic society" as a means of promoting Quebec's distinctiveness.

1420

Here I have placed emphasis on the promotion of this distinctiveness of the province because this right has not been given to any other province, nor to the government of Canada. Although Quebec is declared to be a union of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside of Quebec but also present in Quebec, this fundamental characteristic of Canadian life is only to be preserved, not promoted, as is the case in Quebec.

On another level, one can argue that the "distinct society" clause does little to create a united Canada in which French-speaking Canadians can be made to feel at home throughout the country. Instead, what has been created is a situation where the distinctiveness of Quebec is enshrined in the Constitution. This distinctiveness is not clearly defined in that we do not know if it applies only to the French majority of the province or if it includes the English-speaking minority.

In addition, by creating this distinctiveness around territorial boundaries, the linguistic and cultural distinctiveness of French-speaking people outside of Quebec is not equally assured. Thus, the greatest problem of the clause is definitional. As Ramsay Cook argues, prior to Meech Lake the meaning of "distinct society" was to be found in the conditions outlined by the Quebec government for its acceptance of the Constitution Act, 1982. Yet after Meech Lake, the "distinct society" clause has been set adrift from these provisions, leaving it open to the courts for definition. We are once again left in the position of having the place of French-speaking Canadians in our society left to judicial interpretation.

For many years in our country we have placed emphasis on the bilingual fact of Canadian life. By establishing this fact in the Constitution as a "fundamental characteristic" of Canada we ensure the acceptance of French Canadians throughout this country. I do not believe that anyone could argue that this is not a good thing for national unity. The "distinct society" clause acts only to ensure the promotion of the distinctiveness of the citizens in Quebec, leaving out the interests of the rest of the French-speaking community, although the nature of this right to be interpreted by the courts, for the sole protection of one of Canada's provinces, subtracts from the long-fought-for equality of the French-speaking population of this country, and ultimately for the goal of national unity.

The focus of my paper is on the fact that greater provincial participation in the institutions of the central government will foster greater interprovincial co-operation, which will ultimately lead to a stronger, united Canada. The opposing perception, as I pointed out in my introductory comments, is that decentralization of power will further fragment the country, creating the ultimate community of communities in Canada.

In response to this challenge, I urge those who call themselves federalists to keep several points in mind. The first is, as I have argued in this paper, that the unequal fusion of parliamentary government and federalism has provided the framework for territorial conflict. The way to alleviate such conflict is to allow for regional representation in the institutions of the central government, providing therefore a counterbalance to the majoritarian bias of the House of Commons.

Second, it is useful to look at the US example, as it provides the model for classical federalism. Here we see a country which has experienced much less territorial conflict in that regional issues have not dominated the political agenda to the degree to which they have done so in Canada. Two contributing factors are worth noting. One is that the United States has a much different constitutional tradition than we have here in Canada. The values expressed in the document beginning "We, the people" differ significantly from those found in the "similar in principle to the United Kingdom" version found here in Canada.

It is accepted that the charter will go a long way towards rectifying these differences and thereby creating the impetus for a new political climate. Yet the second factor that must be kept in mind is that the American system has allowed for the representation of regional interests within the institutions of the national government.

It is argued that, in the United States "effective territorial representation within national political institutions has promoted national integration, strengthened the national government and reduced the power of the state governments."

The argument for a corresponding respect for regional interest within the federal government in Canada follows from the US example. This is not to say that a congressional system would be appropriate for Canada, but that the interaction between the two levels of government within that country illustrates the degree to which territorial conflict can be avoided by a movement to intrastate federalism.

Despite claims to the contrary, such accommodation of regional interests can in fact add to the power of the national government. In this era of growing provincial importance and increased overlap of jurisdictional control, the interests of the federal government can only be facilitated by a reduction of regional conflict. As Donald Smiley argued as far back as 1971, "the price of the survival of Canadian federalism may be the radical restructuring of the central government to make it more representative of territorial-based diversities."

It is on the basis of these arguments that I place my support behind the Meech Lake accord and urge the members of this committee to call for its ratification by Ontario. I have shown in my paper that there is an inherent need for reform of the Constitution Act, 1867, if Canada is to survive as a united nation. This need for reform centres not only on the position of Quebec in Canadian society, but on the need for regional representation in the institutions of the central government.

The Meech Lake accord, by giving each of the provinces a role in areas which have traditionally been under the sole control of the federal government, goes a long way to rectifying many of the structural problems of 1867. It is only the "distinct society" clause which violates this principle of provincial equality, and an examination of its meaning and potential effects would be a useful exercise, not only for the members of this committee, but for all Canadians who are concerned with the future of this country. The constitutional accord, 1987, is not the final version of an effectively reformed Constitution, but it does point Canada in the direction of national reconciliation.

Mr. Chairman: Thank you very much. You have obviously done a lot of work, and I know as well, in looking at the background section, historically putting in perspective a lot of your comments. You have particularly focused on the question of regionalism, which I do not think we have talked about a great deal up to this point.

Mr. Eves: I think you are to be congratulated for a very thoughtful and well-produced paper. I gather from your paper that you are obviously in support of the accord, certainly in principle you are. I would ask you to expound upon, or perhaps clarify for the committee benefit, your concern with respect to the "distinct society" clause. Do you think this is something that is enough of a concern--obviously not that you would ask the committee to withhold its support of the accord. How would you propose that the committee go about examining the meaning and potential effects of that clause? For example, it has been suggested to the committee by Professor Baines, I believe, among others, that perhaps a court reference with respect to that clause and others might be a useful exercise. Could you comment on that, please?

Ms. Gillis: Sure. I would agree with that position, that a reference to the Supreme Court might be useful, because there have been so many points raised that no one knows exactly what the clause means, and how it is going to be interpreted in relation to the charter and the rest of the Constitution. By putting a reference to the court, we would at least have, prior to the adoption of the agreement, a clear understanding of how it will be interpreted, should it come before the court at a later date.

My problem with it rests on the belief, as I have argued, that the agreement clearly establishes the fact that its objective is to create the equality of all of the provinces. Because we do not know exactly the effect of "distinct society"--and it may be used by the government of Quebec to gain special powers in relation to the charter in particular--I see that as violating this principle of equality of the provinces. That is where my trouble with the clause lies.

Mr. Eves: Professor Baines's concern, and that of other groups that have appeared before the committee so far, is the same, only she was much more specific in that her primary concern was the effect that clause and others may have with respect to, for example, equality of women. Perhaps Quebec would be empowered, if you read that "distinct society" clause in a certain way, to permit that province to enact legislation that may derogate or take away from women's rights under the Charter of Rights and Freedoms.

Ms. Gillis: As I pointed out in my paper, the government of Quebec has been given the power to promote its distinctiveness, which neither the federal government nor the rest of the provinces have been given. How I see it is that Quebec might be able to use that promotion of its distinctiveness in relation to section 1 of the charter, arguing that specific legislation can override certain sections of the charter, as you said, perhaps the equality section, because it is necessary or justified in a free and democratic society to promote the distinctiveness of the province. That is the concern--being clear on how it is going to be interpreted by the courts.

Mr. Breaugh: You have done what the Prime Minister and 10 other cohorts failed to do. Stick around; there may be a job opening in Ottawa later on this year. You have provided us with a rather clear analytical discussion of why the accord is a reasonable way to proceed and you have identified and verified the legitimacy of that process. I am attracted to much of what you have to say.

There are two or three things I would like to get your response to. One, a number of groups have been before us and made very legitimate arguments that the process overwhelms anything that might be the end result. The Northwest Territories and the Yukon were before us and others will arrive to represent the same case from a slightly different perspective. It is pretty hard to deny that two recognized governments in Canada were not only forgotten about and ignored but when they banged on the door and said, "Let us in because you are talking about us too," the 11 people who made this agreement said no. They are going to challenge that before the Supreme Court.

It seems to me they have pretty reasonable grounds for saying: "You cannot decide who is and who is not a legitimate player at the table on your own. You are deciding the future of a nation. We are legitimate governments. You have recognized that, and you cannot legitimately exclude us when you do this kind of an accord." It seems to me that poses a major problem.

The other difficulty and the other thing I would like you to respond to is that all of what you have argued in this paper are things that basically I would agree with. I have no problem with that at all. I think it is our obligation to respond to groups that have identified specific matters that are of great concern to them, but I do not argue with your conclusion.

My problem is, suppose we had done this process at the end of this long committee process, and two years from now 11 people, or 13, met in Ottawa and said: "We represent all of the legitimate, recognized forms of government past the municipal level in Canada. We have thought about all of the concerns, we have taken amendments from all over, we have listened to proposals, we have taken this through our local legislatures, and here we are in Ottawa at the end of the process. We have clearly been delegated by our provincial governments to represent them on constitutional matters, and this is the agreement we came to. Now we would like you to ratify it." That is a process that is open and democratic. I understand it. It respects our existing institutions. At that point in time, absolutely no one in the country, in my view, would have a legitimate claim to cry foul.

The problem is, nobody told anybody that 11 people were going to go to Meech Lake to a cottage, that they would stay there overnight and out of that would come a new Constitution for Canada. Then they would meet a little while later at an office building in Ottawa and finalize the deal. Then they would all go back across the country and say, "Here is the deal, and no one in the

nation is allowed to amend it." That process stinks. That is one that flies in the face of the democratic process in any part of the free world that I am aware of.

You tell me how you would analyse and defend that process, because I am concerned that--and I put this question to a number of groups who have come in here--the way this deal was done overshadows its merits to many people and may, in the long run, destroy it. I would be interested in your response to that.

Ms. Gillis: I think the defence of how the accord was brought about rests in the fact that the Prime Minister and the 10 premiers would say that it is a democratic process in the sense that they have been delegated the authority by the citizens of their province to represent the interests of their province, that this is their role, to come together and discuss these issues.

I certainly agree with you that it was a closed process and the fact that no amendments are allowed seems to detract from its significance. I cannot really justify the process itself, but that is how I would argue it. They would assume it was democratic in the sense that they have been elected by the people to represent their interests.

Mr. Breaugh: Ok. Let me just pursue one other quick question. This is all being made legitimate now by the creation of a new term. There are variations on it, but I guess the most commonly used one is "executive federalism." I know of no such term in the history of Canada. I do not know that we have ever used it before, but now, out of necessity, it seems to be born. Again, I do not deny for a moment that these were premiers and the Prime Minister. We have never done it this way before.

I think the fact that the ratification process requires each of the legislatures to adopt it is a clear indication that they, too, know they have no such power. If they had that kind of power, if the history of Canada and our existing Constitution and our political traditions said, "Those 11 people have a legal, moral and political right to sit in a cottage and decide this," I would accept that. But no such precedent exists that I am aware of, and I think they acknowledge that by the simple fact that this agreement must be voted upon by each of the legislatures, the federal Parliament and the Senate. The fact that no amendments are allowed is a new political rule. I do not know of any other rule that has ever been put on anybody's parliament in Canada that says: "Here is a bill. It cannot be amended." Quite the contrary.

Give us your rationale on how you would handle that.

Ms. Gillis: I think it is a difficult question to address for the reasons that you have stated. It is almost a redundant process. At this point, there is really nothing that can be done about it. What we can do, I guess, is learn from the exercise of Meech Lake for the future and perhaps move to a system where amendments to the Constitution follow in the nature that you outlined earlier where there are meetings such as this and public hearings and input from the people whose views are represented to the Premier prior to his representing the interests of the people in a meeting of executive federal leaders. I think that is what we can learn from Meech Lake at this point. Trying to defend what they did is very difficult. As I said, it is almost redundant. There is nothing we can do about it now.

I am certainly troubled by it as you are, but now we have to look to the future and how we can rectify that situation in future constitutional amendments.

Mr. Breaugh: It is a good thing you did not apply for that job. I think you would beat Mulroney hands down.

Mr. Elliot: I, too, would like to begin by complimenting you for an excellent presentation. The people who have been witnesses here in front of the committee, who are optimistic like yourself with respect to the future of Canada, always appeal to me a lot more than the ones who are not and would like to reject things. I would like to highlight the final comment on page 16 of your handout that you gave us. "The constitutional accord, 1987, is not the final version of an effectively reformed Constitution, but it does point Canada in the direction of national reconciliation."

We began this whole process by listening at length to a number of very astute and learned people with respect to constitutional amendments, processes and that type of thing. This week we have been listening to people who are finding fault for very valid reasons in their own minds with various aspects of the accord--both the process and the detail of the accord, I might add.

1440

You say we now have to look to the future. What I would like you to comment on further, if you would, are your impressions because you have already obviously done a great deal of work with respect to considering this accord and constitutional amendment and the process that should be followed. Within the accord, assuming it is accepted by everybody, we are guaranteed that there will be first ministers' conferences on a regular basis and that type of thing. Can you expand upon the type of thing that, in your mind, might be desirable to make those first ministers' conferences more worth while?

Ms. Gillis: When I say the accord is pointing us in the direction of national reconciliation and there is still a need for reform, that follows from my belief that the accord is moving us in the direction of intrastate federalism. As I said, the provisions put into the accord are not the final ones. We do not have an intrastate federalism constitution now because of Meech Lake, but it is pointing us in that direction, which is going to help, in my opinion, to alleviate some of the regional tensions by allowing the provinces to be represented in the central government. Canada's history has been dominated by conflict between the provinces and the central government; so I believe that by allowing the provinces to have a role within central government some of this conflict will be avoided.

To look to the future, we see the commitment, as you said, for first ministers' conferences on the Constitution. Specifically, Senate reform has been pointed out. The reform of the Senate is perhaps one of the greatest areas where the government can move towards intrastate federalism by allowing the provinces to have an effective voice in Ottawa. I think that will be another step towards this process of national reconciliation.

Mr. Allen: Why would one assume that a Senate composed of provincial representatives would somehow represent a balancing act to the federal government when it might well simply be a wrangle between various provincial and sectional interests in the country? That is the first question.

Second, would not one of the offshoots of executive federalism be to highlight once more the disparity of powers among different provincial regimes and between the provinces on the one hand and the federal government on the other?

I am thinking of reactions from some spokesmen from various of the smaller provinces, who have said, "Our capacity to field resources for those battles on an ongoing basis, as well as all the interministerial conferences that take place across the country already, is so much smaller than those, for example, of Ontario, Quebec and the federal government that we simply will be cut to pieces in the process."

Is there not a possibility that entrenched executive federalism will open up new regional conflict?

Ms. Gillis: Certainly, I think there is that potential, but we also have to keep in mind that each of the provinces has been given an equal voice in this movement. One would assume, hopefully, that the opinion of or the weight given to the interests of each of those provinces is equally important, although, as you say, smaller provinces will suffer from not having the resources to present their views as clearly as the larger provinces, such as Quebec and Ontario, and the federal government itself.

The point is that those provinces have the opportunity to present their views and they carry as much weight as those of the rest of the provinces. In that sense, it is a balancing of the majoritarian bias of the larger provinces in that the interests of the smaller provinces count just as much as do the interests of the larger provinces, which are more populous. That, I hope, would be the case in a Senate that was reformed, with equal representation for each of the provinces, in that the smaller provinces would be given a voice equal to that of those provinces that are larger in both resources and population.

Mr. Allen: You do not sense a problem in the multiplication of provincial participations in each of these new segments of renewed federalism in Canada that would significantly tilt the balance quite dramatically in the opposite direction and we would end up with a very decentralized federation?

We have gone through this oscillation in our history. We started off with a very centralized concept and within 20 years it was being reinterpreted in a very decentralized concept and by the time of the crisis of the Depression moving back the other way at a time when we needed more centralized powers.

There seems to be some flexibility there, but the more you get this built into tight construction of provincial participations here and there, it becomes more and more difficult to accommodate those swings of adjustment, if you like, of flexibility in practice. You end up with something that is irremediably decentralized, irremediably provincialized, with all the problems that creates for national unity.

Ms. Gillis: I agree with you that there is a movement towards decentralization and that the Constitution has swung from a centralized state to a decentralized state, but that has occurred partly because of the nature of the Constitution itself, which gave certain powers to the provinces, which naturally led to the provinces becoming more important and requiring more resources and power.

I see allowing the provinces to have a voice in the central institutions of government as a strengthening point for the federal government, in that if it acts to reduce regional conflict, then you are not going to have the constant interplay of province against central government all the time. In that sense, the citizen's loyalty will not be divided. For instance, I am an Ontarian before I am a Canadian.

Do you understand the point I am trying to make? By alleviating the regional conflict, citizens are not torn between their province and the central government all the time, and I see that as being a strengthening force.

Mr. Allen: Now they can be against other provinces and the federal government.

Ms. Gillis: One would hope not.

Mr. Allen: I would hope not too.

Mr. Chairman: I want to thank you, on behalf of the committee, for coming today. Perhaps I can just mention, because I know some of the members have been interested, that yesterday we had one of your classmates, Gayle Barnett, here. I am not sure what the course is, but I commend members of the class for coming forward to the committee. We have had two very interesting papers.

I think it was mentioned by Mr. Breaugh yesterday that when a private citizen takes the time and effort to put the kind of work that you obviously have into your presentation, we know these are views which you really want to express and bring before us. We thank you very much for doing that. Good luck with your report.

Ms. Gillis: Thank you.

Mr. Breaugh: We will all be recruiting from that class like mad now.

Mr. Morin: Apply for a job now.

Mr. Chairman: I now call upon the representatives of the Voice of Women, Kay Macpherson, Madeleine Gilchrist and Betsy Carr. We thank you very much for joining us this afternoon. We have had a lack of water at that end, so we wanted to make sure there was at least something there as well.

I am not sure who is going to serve as spokesperson. We have a copy of the presentation you are going to make, so if I can just turn the floor over to you, please proceed as you wish. At the end, we will follow it up with questions.

VOICE OF WOMEN

Ms. Macpherson: I am not going to be the spokesperson; we are going to do it as a trio. My name is Kay Macpherson and I have with me Betsy Carr and Madeleine Gilchrist, all members of our Voice of Women administrative committee. In addition to that, we have other fingers in the pie, so to speak. Betsy is with the Canadian Federation of University Women. Madeleine Gilchrist is with the Réseau des femmes du Sud de l'Ontario and also has been vice-president of the advisory committee to the board of education on French language.

We are all past members of the executive of the National Action Committee on the Status of Women. This is what is known, I think, as a network. It spreads.

1450

In addition to our Voice of Women connections, we do speak for a number of women with whom we have constantly been in touch over the years.

I must apologize because I am not sure if I am able to read well enough to read my section. We have divided it and if I am stumbling too much, I will hand it over to my colleagues. First, we start with Betsy Carr.

Ms. Carr: Thank you for this opportunity to add the voices of Voice of Women to the growing chorus that calls for change in the Meech Lake constitutional deal. A Toronto Sunday Star editorial on the amendment on February 7 called it flawed, the title being A Time to Listen. The Peterson government is listening through this committee to concerns and recommendations for changes and we are optimistic that these pleas will effect change.

I just want to add that our presentation is quite short; it is five pages. I overheard that the previous one was 16 pages. We have purposely kept it to the things we thought were most important, but as the previous presenter continued, I was wishing that I had a few more things in mine because I would like to indulge in dialogue with her. I could not agree with a lot of her things but, anyway, we will proceed with ours.

Mr. Chairman: There is an opportunity during questions to get into some of those other areas.

Ms. Macpherson: A little bit about our history: Voice of Women/La Voix des Femmes was founded in 1960 as a national organization with branches in every province, including Quebec. VOW works for international co-operation and disarmament, responsible environmental policy, for equality and human rights. As a nongovernmental organization, an NGO, we are represented at the United Nations and work with many other peace and women's groups across Canada and abroad.

We are a founding member of the National Action Committee on the Status of Women and have consulted with and lobbied government for over 25 years. Our members worked to establish the equality clause in the Charter of Rights and Freedoms during the 1980 and 1981 sessions. Earlier still, our French- and English-speaking members played important parts in the actions leading to the establishment of the Royal Commission on Bilingualism and Biculturalism. We are therefore convinced of the importance of the concept of Quebec as a distinct society, and in no way do we wish to jeopardize Quebec's acceptance of the Meech Lake accord. I will skip the next sentence because it is a repeat stated later on.

Voice of Women's major concerns are as follows--and as Ms. Carr has said, we have many others but we will reserve them for later: the process, the equality rights and opting out.

I am going to ask Madeleine Gilchrist to read the section which follows because I think you will be getting bored by listening to me stumble.

Ms. Gilchrist: You might get used to my accent, too.

The process: Canadians believe that they elect their representatives and participate in a democratic process which encourages responsibility among citizens for their own government and its policies and decisions. This democratic process requires that citizens be well-informed and able to make reasonable judgement for the common good, and for this they require information and the consideration of their ideas and suggestions.

The process by which the Meech Lake accord was developed and made public runs counter to this whole democratic principle. At both federal and provincial levels, Canadians were presented with a fait accompli, given minimal time and facilities for gathering information, assessing the meaning and implications of the accord, discouraged from questioning or opposing any of the many confusing or potentially hazardous sections and, as far as women were concerned, excluded from the accord and told not to worry their little heads about it, all would be well.

The democratic process went by the board and half the population was politely insulted.

Canada is not a corporation whose managers have a free rein in deciding what is best for the business and themselves. Our Constitution is Canada's most important document, affecting us all, and citizens have a right to be listened to when it is being developed. Eleven men and their bureaucratic draftsmen cannot do an adequate job alone.

We are told that Mr. Peterson has said he will consider no amendments. If this is so, what are we doing here today? Wasting time, energy and money for an exercise in futility? We hope not. Since the date for a decision is two years away, we suggest a cooling-off period for study and discussion so that at least in this province the democratic process may be seen to be working and the citizens are treated like intelligent human beings, complementing the work of the politicians and bureaucrats.

I will pass to Betsy on the equality rights.

Ms. Carr: Most important to women is clarification of the present status of equality rights, which the charter established in sections 15 and 28, a triumph in 1981, after extraordinary efforts by thousands of women across Canada. The Liberal government in Ottawa had listened.

Section 15 guarantees the right to equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Of these, the sex base affects over half the population.

Section 28--I hope you do not mind my repeating these; it is just for review purposes, because we are going to discuss them.

Mr. Chairman: Please do.

Ms. Carr: "Notwithstanding anything in this charter, the rights and freedoms referred to are guaranteed equally to male and female persons."

Women's expectations in 1988 are just the same--no less. But section 16 of the 1987 amendment reaffirms the guarantees for multicultural and aboriginal peoples and official language minorities, conspicuously omitting women's equality. The social contract between men and women in the charter is ignored. Our information is that the 11 men who were first ministers had no

intention of jeopardizing women's rights in this way. They were working to a deadline of a few hours, and probably without competent advice.

Some legislation has not yet been updated to comply with the charter, even though three years were given for this, making the legal situation for the court process unclear, where claims to equality are seldom, if ever, unopposed. The omission from the Meech Lake amendment adds confusion. When different groups are treated differently, something is given to some and not to others. We are offended and confused that the wording does not clearly state what is meant, and women dare not risk unknown court decisions or the promise of future correction, given the rocky history of women's rights in Canada.

I would just like to add at that point that the reference to the Supreme Court is included here. I think it could be quite difficult because of the present very fuzzy situation where we just do not know where we stand. This is on good legal advice that we understand this, so I think it would be a risky thing to do at this point.

The solution we advocate and recommend you take to the Peterson government of Ontario is charter primacy. This is the recommendation: Voice of Women recommends deletion of section 16 of the constitutional amendment, 1987, replaced by a provision that the Charter of Rights prevail over the amendment. It is our firm conviction no other remedy will suffice. It is broke; fix it.

I will pass now to Ms. Gilchrist

1500

Mme Gilchrist: Vous avez la version en anglais. Je vais continuer en français sur la dualité linguistique de l'article 1 de l'accord en tant que caractéristique fondamentale du Canada. Je suis une francophone, comme on dit, hors Québec, et depuis 1981, les groupes de recherche de l'égalité, nous avons un but en commun et nous n'avons cessé d'y travailler ensemble. Maintenant, ce que l'accord fait, c'est qu'il nous sépare, car dans ce document, qui traite les groupes différemment les uns des autres, égalité peut signifier différentes versions.

Je considère ce principe absolument très offensif quand on pense qu'en 1981, et bien avant aussi, on travaillait ensemble. Maintenant, on nous traite différemment en établissant une hiérarchie des droits. Ce n'est pas la direction que nous avons choisie, mais c'est en tout cas une raison de plus pour amender l'accord du lac Meech.

Ms. Macpherson: The Voice of Women is convinced all Canadians are entitled to equal levels of services and opportunities no matter which province they live in. Section 106A exacerbates regional differences. It permits provinces to opt out of new point federal-provincial programs, raising many questions. Words used are ambiguous, e.g. "national objectives"--who defines them--"initiatives" and "compatible"--in whose opinion? Who makes the assessment? Canadians in different provinces will not receive equal treatment.

One alternative is to delete section 106A from the accord. The new provincial veto power on constitutional amendments is a dangerous restraint on the repair of present omissions or unclear passages and on future proposals on provincial status.

Altogether, federal powers are diminished and balkanization of our country ensues. Who speaks for Canada and our national distinctiveness?

Ms. Gilchrist: To summarize our presentation, we would like to urge this committee to consider the following points:

The accord on the Meech Lake process has brought lack of confidence, lack of information and a lot of confusion, forcing people into questionable choices and putting women's equality of rights at risk.

Therefore, we recommend that a cooling-off period be set and that consultation between government officials of the province of Ontario and representatives of the equality-seeking groups be established, so that communications can be facilitated freely with the public, keeping in mind the Premier's comments and promise that we should have a more open government. So far, it reflects badly on his credibility and political future. Also, we recommend that provisions should be made for funding the equality-seeking groups so that they can meet and consult on a regular basis similar to the 11 premiers.

The last, but most important, recommendation is to amend the accord to give primacy to the Charter of Rights.

Mr. Chairman: Thank you very much. You mentioned at the beginning that your presentation would be short, which it was in some respects, but you have been very clear and specific, and for that we thank you.

I wonder if I could just ask one question, just so we understand clearly the organization of the Voice of Women. You are a national organization. One of the questions that has arisen at times is to what extent the concerns a number of women, as individuals and within organizations, are expressing are shared by women within Quebec.

I assume that within your organization, as la Voix des femmes, you have francophones, obviously, but also women from within Quebec. In terms of the various points of view that have perhaps been expressed within your own organization, how would you characterize the reaction of various women's groups in Quebec? Are there differences of opinion there? How should we sort of approach that one aspect, because it is one question that has arisen?

Ms. Macpherson: With the lack of information and the length of time it takes to communicate, it is difficult for us to get a clear picture. Although I suspect the majority of our members would certainly support the "distinct society" provision, we have had no opportunity since the summer to meet with them for any extensive time to sort out any difficulties or differences, so I cannot really give you a clear answer. It is partly because of the fact that the information coming and going between us was unclear, for them and for us. It is something that time will sort out, if we have time to make quite clear to them how we feel and they have time to make clear to us how they feel, if we are dividing them by language at the moment. I am sorry I cannot give a clearer answer.

Ms. Gilchrist: May I just add that we are all in the same boat. Let us face it. In terms of equal rights, it can be Quebec, it can be British Columbia or whatever. It does not matter which language we speak; we are oppressed, we are deprived of our rights and Meech Lake is just a mess for women. We are back to square one, where we were before 1981. We all share the same comments.

Mr. Eves: Quite frankly, I think you have enunciated two very important recommendations to the committee. Your first one is with respect to a cooling-off period. We have heard a lot over the two-plus weeks we have been sitting with respect to a process. Many members of the committee have enunciated that perhaps we should be looking to a way to provide a better process in the future. I have often subscribed to the theory that there is no better time to start on the future than right now.

With all due respect to some members of the committee, this government had a very ample opportunity--in fact, the Premier (Mr. Peterson) was questioned in the House in late April--to provide for open public hearings between late April and the first draft of the Meech Lake accord, and the first part of June, when the final draft was agreed upon. He quite flatly refused to do so. In fact, I think the only legislature in Canada that did so was that of Quebec. The National Assembly there was the only one that actually had public hearings and public input before the final draft was agreed to by its government.

Although it may take some swallowing of political pride by the Premier, he is now being given a second opportunity, through recommendations such as yours, to adopt this cooling-off period and to actually listen to what the public is saying. Even if it means backtracking politically, I think he would be well advised to adopt that advice and listen to what the people are saying. Hopefully, he will.

The second point you make--and I wholeheartedly agree, and others who have appeared before the committee have agreed as well--is that there has to be some clarification of this ambiguity as to whether the Charter of Rights--and I mean all the rights enunciated in the Charter of Rights and Freedoms--has primacy over the accord. We hear constitutional experts and lawyers on one side saying, "Of course, it does." My obvious reaction to that is if that is what everybody means, why do we not say so and enunciate it in very clear language?

That is exactly the amendment that Professor Baines was talking about when she said that perhaps all the rights protected by the Charter of Rights and Freedoms should be enunciated very clearly to have primacy over the courts. I take it you would be in favour of her proposed amendment.

Mr. Chairman: Just for the record, I saw heads nodding, but so it is recorded, would somebody like to just indicate what the nods meant?

1510

Ms. Gilchrist: You do not like body language.

Mr. Chairman: In either of our official languages, but perhaps someone would just--

Ms. Carr: That was one of our recommendations, and we still feel that way at the end.

Mr. Allen: I am quite pleased personally and I know my colleague is as well to have the Voice of Women here making a representation to us and to hear you speaking both with one voice and two voices. That is very nice.

The committee appears to be coming to my point of view--I will not put too many words in everybody's mouth--but it appears to be very much seized of the problem that you have brought before us with regard to process. I think more and more of us, and more and more members of the Legislature, are really concerned that this thing is being done backwards.

One of the nice things about doing it forwards, and I would like your response to this, about having done it the other way around, would have been that it would have brought a lot of the rest of us up to speed as far as constitutional debate goes. While it has been said--and you may have alluded to it; certainly my colleague did in a previous question and others have in other papers--that Meech Lake is unprecedented as a constitution-forming device, in actual fact, it has been the practice we have adopted in this country from the very beginning.

Constitution making has been very much an executive exercise. Constitutional conferences have gone on in this country for some length of time as executive enterprises and most of the rest of us have not, if you like, been clued into the language, been familiarized with the Constitution or got used to the terms and conditions of debate so that we can really meet the whole thing head on. That is one of the chief problems I have with the process. It is not just that in actual fact it cuts us out, but it leaves us totally out of the educative process that is necessary to engage in the debate in the first place.

In that respect, I wonder if you have that same feeling, that you have not just been disfranchised in one sense, but doubly disfranchised by this process.

Ms. Macpherson: You sound like a woman talking.

Ms. Carr: I think the three of us who happen to be here today all took part in the struggles back in 1980-81, so we felt we were kind of picking up where we left off. We thought we had settled this matter, and here we are again. From our point of view, it was not as difficult. We were certainly involved then, but for the general public and for people who were not closely involved at that time, who did not have their interests threatened, as women's interests were at that time and as they are again, I think you have made a very good point. Public discussion on this or on the defence white paper or on the trade deal, public discussion on all of these things is very important in our society. We should have opportunities to make our positions known and we thank this committee for doing so on this subject.

Mr. Offer: Thank you very much for your submission. You have raised and touched upon some very important points. What I would like to do is direct your attention to the bottom of page 1, where you indicate that your members worked to establish the equality clauses in the Charter of Rights and Freedoms during 1980 and 1981. On page 3, under the equality rights, you talk about the efforts that were made in 1981.

As you are probably aware, we have been from day one grappling not only with the change to the Constitution but also with the process of how change has occurred. I was wondering if you might share with us your involvement in that process in 1980-81 so that we might be able to come to grips with the issue as it is being addressed to us in 1987-88.

Ms. Gilchrist: Do you want us to give a summary? It involved a lot of phoning, a lot of legwork, and it mushroomed. Fortunately, we had the big help of women lawyers on our side, and Kay Macpherson herself was involved. It started in a café in downtown Toronto--as simple as that.

Ms. Macpherson: I think that is the main thing. We started with the grass roots, and I am talking specifically of the action which eventually ended in section 28 and the equality clauses being put in. It was a network of women which developed almost spontaneously with help from women in the media, women in Parliament of all parties, the backup staff of the MPs and so on who helped us, and it started, as Madeleine said, in a café where we got together with a small group to talk about it.

It also had the beginnings because of the cancellation of the opportunity that women were supposed to have to talk about the Constitution, the cancellation of the conference that was called by the Canadian Advisory Council on the Status of Women, which was the spark, I think, that got everybody going. From that it built up, and that is where we got the long and tedious tasks going of sorting out what women wanted.

Mr. Offer: After that sorting out and after those many, many meetings, you took your concerns where?

Ms. Carr: We had a huge conference in Ottawa with 1,200 women, all set up in three weeks. We came together and made conclusions and recommendations at that point, and then they were presented to government.

Ms. Macpherson: They were lobbied.

Ms. Carr: They were lobbied. We worked hard.

Ms. Macpherson: Both the federal and the provincial first ministers got followed around all over the place. They had meetings with women. It was sheer badgering by the people concerned which got their attention and made it clear that women were really determined to have some changes made. Otherwise, I do not think it would have happened.

The press probably caught the excitement of the actual fact that 1,300 women had got themselves to that conference, with no financial help whatever from any government or any other source, were given the space in the House of Commons by, I think, a conglomerate effort of the women MPs of the time, followed by the mayor of Ottawa, who was also a woman, giving us the building there for the second day's conference. It was a collaborative effort, which I think sparked the public's imagination and then eventually got the attention of elected representatives and the people who were making the decisions.

It was a long process. It went on well after that conference, right into the next spring.

Mr. Offer: I believe it is important the committee know something of the process you went through in 1980-81 when we are dealing with concerns raised again in respect to the process in 1987-88. I think it is important to know what you have done in the past so that we might be directed in a better vein in the future.

Ms. Macpherson: I should refer to the Ad Hoc Committee of Women on the Constitution, which will be making its presentation to you later on, because it was on that committee--the name of the committee, anyway--that

those women came together and that was the essential motivating force for that. They would have far more of the details than we can give you.

Mr. Offer: Thank you very much.

1520

Ms. Carr: Thank you for the question.

Miss Roberts: I might continue on in the same vein as Mr. Offer. Thank you very much, ladies, for your concise information, your ideas and your great work in the past many years. I feel very inadequate seeing you three there and the people who have helped you and what you have done for the cause of all women in Canada. Your concern here today is well documented by your presentation, no matter how brief you think it is, but I know you have many other concerns. I can just tell that they are bubbling in there somewhere.

I do want to go back to the process because no matter what we do with the Meech Lake accord, that is a living document that is there, our Constitution, and it is going to change from time to time. What you did in 1981 and what you are doing now, which seem to be stopgap measures, that is not what the process should be. The process should be a building of consensus in some way towards a change. Do you have any thoughts on that?

What happens in the next 10 years? There is going to be a development. The Charter of Rights and Freedoms is not going to stay as we know it today. The words that are there are going to be interpreted by courts and we are going to say, "No, that is not what is meant by that," and we are going to want to change it. What happens with section 15 in the next month or two, or year? We do not know. If the courts interpret it in a way you do not think it should be, you are going to be back asking to change that or develop it in some way.

How do you see us developing a process that is going to allow us to keep the Constitution in tune with a developing Canada?

Ms. Gilchrist: First, do not make the mistake that has been done now. Number one, I mean that is so disgusting, let us face it. Keep negotiating. Keep talking to the women involved. There are enough women who are head of those groups and so on to continue the consultation, to continue the negotiation, and talk to us and develop a kind of feedback and not enrage us once more like we were in 1980. Maybe we need that, to have women so enraged, as we say in French, that we do something. We do not want to go through that process again, but I think that consultation, the negotiation, that is what is part of our recommendation actually.

Ms. Macpherson: You are going to have to hear from all of us on this one.

Ms. Carr: I would just like to say that your statement that this Constitution is something that we have because I think the amendment is so badly flawed that it is going to get in the way of that kind of consultation, and I think particularly the veto power of the provinces. We know we have a great deal of trouble getting all the provinces to agree. I think that is a big problem or it is a potential problem. I would like to see something changed in the accord so that it is easier to negotiate and to bring forward other amendments later on.

Ms. Macpherson: I would like to answer that. We have this feeling of urgency and almost desperation that if it passes in its present form, we are going to be locked into a much more difficult amendment in the future. Now is the time, and that is why we are looking to Ontario as a possible hope for this, that some changes--and vital ones--may be made before we are locked into having to try to unravel the thing when it is already set in stone, so to speak. Granted, the courts will be there, but the legislative process is still with us. We feel it is urgently essential that some of those changes be made before the final agreement on the accord.

Mr. Chairman: I would like, if I might, just to ask one question and perhaps I could direct it to Ms. Gilchrist. Two days ago, in the testimony which L'Association canadienne-française de l'Ontario brought before us, and again in part of your submission today, there is, I think, a fundamental point that is made which, for me, as I examine the accord, goes right to the root and branch of the reason why the accord came about. This deals with the distinct society and the francophone minorities outside of Quebec. I want to be very clear in understanding your viewpoint on this. When we hear about the different arguments as they affect charter rights, aboriginal rights and other sections of the accord, I can look at those and follow those through and see how one might be able to make a better accord without necessarily taking away what I imagine for Quebec is the fundamental point, which is the distinct society.

What ACFO said to us the other day, and what I sense you are suggesting as well, is that the concept of the distinct society for you as a French-speaking Canadian living outside of Quebec makes you feel as though something very fundamental has happened here in terms of your rights as a French-speaking Canadian and, perhaps in a similar vein, an English-speaking Quebecker.

Do you see a way in which the concept of the distinct society, which has been a fundamental request by Quebec since 1982, if not before, can be maintained in the Meech Lake accord or some other accord and also find a way whereby the official language minority groups are also protected? It just strikes me that that point is very fundamental to the reason why we are even looking at the accord. As members of the committee, how do we wrestle with that issue of to what extent that distinct society appears to take away from French-speaking Canadians living outside Quebec?

Ms. Gilchrist: OK. Let me just start by saying that the only good thing about the accord is that we got Quebec into it, so we welcome that. I do not want to get too much into the debate on Quebec as a distinct society, but I see a problem with Quebec women being called a distinct society because the government of Quebec cannot so discriminate them and they would have a double discrimination, one on the equality rights and one with the language.

What I do not like about the accord are those little boxes that you have put people in: minority rights, heritage and so on. I have fought a lot in this province to have a French public school here in Toronto, which is Gabrielle-Roy. It does not mean that I agree 100 per cent with what ACFO is saying and so on. I also see how people are living in Manitoba and the difficulty they had in order to get their language way.

I myself come from a country, Switzerland, where we have four official languages. I know what is very important when you have to keep your language, and I have never felt a second-class citizen in Switzerland, being French, as I have here in Canada. I am a Canadian number one and that is why this accord,

to me, is really putting me absolutely with the other women and the other people of Canada. Where do I fit now? I do not want to fit. I am a Canadian.

Mr. Chairman: I want to thank you very much for joining us this afternoon and for presenting your brief. As others have said, you have put forward some very specific comments for us to consider and we are indebted to you for doing so. Thank you.

If I might call upon Joe Miskokomon, the Grand Council chief for the Union of Ontario Indians, to please come forward. Thank you for joining us this afternoon. We apologize for falling behind a bit, but we do want to make sure you have the time you need to make your presentation. Perhaps the best thing is if I simply let you proceed and, following your presentation, we will pose some questions.

1530

UNION OF ONTARIO INDIANS

Chief Miskokomon: I would like to take the opportunity to thank you and the select committee for allowing us to appear here today. Although the time is short, we would be pleased to reappear in order to elaborate on any specific issues.

If I may just address the kit that you have in front of you, on the right-hand side will be the oral presentation, which I will submit today, and on the left-hand side is a broader and more detailed version that you may wish to consider.

The Anishinabek nation is a confederacy of 43 first nations whose homelands stretch from the Hudson Bay watershed to the American border, from Windsor to the Ottawa Valley. Our people number 25,000 and are members of the Chippewa, Ojibway, Delaware, Odawa, Algonquin and Pottawatomi nations.

Long before the Meech Lake accord, our elders and chiefs in assembly stated: "We are a distinct people. We have a distinct territory and our own lands. We have our own laws, languages and forms of government. We survive as a nation today."

As nations, we have never surrendered our aboriginal title or rights, including the jurisdiction over our own ancestral lands. Nor have we surrendered our ability to pass laws with which to govern our people. As nations, we made decisions to negotiate military alliances with the British crown. Later, the Anishinabeks signed 44 treaties with the crown which delineate specific obligations to our people. In making these treaties with your forefathers, the crown formalized its recognition of our sovereignty.

Canada has a tradition, inherited from Great Britain, to acknowledge the sovereignty of aboriginal people. The treaty was a specific instrument for the relationship between nations. Our distinct status as sovereign powers rather than subjects of the crown was reflected in our absence from the conference that resulted in the Constitution of 1867.

We turn our minds now to the Meech Lake accord and the amending process. We, like others in Ontario and Canada, must express serious reservations about the process used to develop the Meech Lake accord without meaningful input. Historically, our nations used consensual processes to define direction, action and, ultimately, laws. Perhaps the various forums which you have now

established, such as royal commissions and special hearings, are evidence of participatory democracy as traditionally practised by our people. Unfortunately, these opportunities were not used prior to the drafting of the Meech Lake accord.

Provision 16 of the accord has been the subject of much criticism and suspicion by the first nations with respect to the intent of the first ministers because of its reference to section 35 of the Constitution Act, 1982. Had we been participants in the Meech Lake discussion, this particular controversy could have been avoided.

With regard to Quebec as a distinct society, we are pleased that Quebec has achieved its objective of amending the Constitution Act, 1982, and has successfully sought the consideration of specific issues to meet the needs of its constituents.

However, the Anishinabek have grave concerns with the amendments which have been proposed to accommodate the objectives of Quebec and other provinces. A key element of one such amendment is the principle that Quebec constitutes a distinct society and incorporates a concept of French-English linguistic duality as the only fundamental characteristic of Canada. This amendment implies, and may be so interpreted by the judicial system, that aboriginal people and our cultures are not a part of the fundamental characteristics of Canada.

The provision of this amendment, in particular, would impose great difficulty on our attempts to secure recognition of our aboriginal languages. These languages are rapidly being lost, a loss which we believe should be seen as a tragedy of national proportion. An old Cornish proverb says, "A tongueless man gets his land took."

There are several other arguments which could be made against this amendment, but all of them converge on one serious concern. While this new provision appears merely descriptive, by outlining one fundamental characteristic of the country, over time it may become prescriptive and be taken to determine the fundamental characteristic of the country. In the absence of constitutional recognition of aboriginal governments, it is likely that the "distinct society" provision will pre-empt constitutional acknowledgement of the reality that Canada is a country whose fundamental characteristics include the existence of aboriginal government. We, as Quebec prior to 1987, know well the feeling of being on the outside looking in.

We turn towards the federal trust responsibility and spending powers. Section 91(24) of the Constitution Act, 1867, specifically defines the federal government's responsibilities for "Indians and lands reserved for Indians." Pursuant to this clause, the government has introduced the Indian Act, which describes a "trust" responsibility for Indian people. As principal trustee for the Indian people, we charge that the Prime Minister, in the Meech Lake accord and subsequent discussion, was derelict in his responsibility for the protection of our rights and those of the northern aboriginal people.

It is clear that the provisions of the Meech Lake accord affect the balance between federal and provincial powers. Ultimately, this may mean that the federal government's ability to fulfil its responsibilities under section 91(24) of the Constitution Act, 1867, both the letter and spirit of the treaties and other obligations may be compromised.

In particular, we have grave concerns that the Meech Lake accord shifts

the distribution of spending power and may impair the government's fulfilment of financial obligations to Indian people. The proposed amendment allows the province to opt out of national shared-cost programs, with compensation, providing that they pursue similar programs or initiatives that are compatible with the national objectives. This poses some fundamental questions.

How does section 106A influence the possibility of aboriginal people participating in the establishment of national objectives? What would be the result if the first nations chose to be included in a national shared-cost program while Ontario opted out? How might section 106A affect the abilities of the first nations to establish their own objectives, criteria and standards for funded programs? Finally, what are the relationships between national objectives, cost-sharing, opting out and agreements such as the 1965 welfare agreement in Ontario?

It is our analysis of these questions and considerations of federal jurisdiction delineated in section 91(24) of the Constitution Act of 1867 which requires us to reiterate that our access to federally funded programs must be maintained and enhanced.

With regard to the creation of new provinces, with respect to section 41 of the accord, necessitating unanimity for the creation of new provinces, all of us, including provincial governments, have known for some time that the aboriginal people of the north aspire to provincial status. This is no big secret. The Northwest Territories and the Yukon are the only remaining regions in Canada in which native people represent a significant percentage of the electorate. This veto power negotiated by the provinces seriously impairs an expression of aboriginal government in Canada.

Clearly, we must address the role of the existing provinces and an issue which goes to the heart of the special relationship which has always existed between the federal and the aboriginal governments.

We move on to the first ministers' conferences. We concur with the other first nations that a timetable be established to prepare for further constitutional conferences on aboriginal rights. We must continue to insist that aboriginal people have equal, ongoing participation at those conferences at which the agenda will address items of paramount significance to our people. This protection was afforded with section 37 of the Constitution Act of 1982. We note that the first ministers did not choose to reinstate these provisions.

A specific agenda item for future conferences will be the "roles and responsibilities in relation to fisheries." Fishing is both an aboriginal and treaty right, and the proposal that the governments will discuss and negotiate amendments through this process no doubt will impinge upon our constitutional rights.

For example, the discrepancy in the interpretation of our rights has resulted in the Ontario government paralyzing the fishing agreement negotiations with the Union of Ontario Indians and the subsequent implementation process of the first nations. Our ability to legally exercise our constitutional rights has been denied until interest groups are politically aligned. If this practice is allowed to continue, the exercise of aboriginal and treaty rights will remain a mirage for our people.

Our principal intention during the first ministers' conferences has been to seek constitutional protection for our right to self-government. Many discussions have focused on concepts, institutions, jurisdictions and authorities which might be sought by first nations. Some of the provinces have declared that the concept is too vague.

The first ministers demanded the most detailed explanation about the nature, practice and implementation of aboriginal governments. We were told repeatedly that no clause could be added until such time as all parties agreed on the wording and interpretation, yet the Meech Lake accord proposed the concept of a distinct society, together with dozens of other new constitutional phrases which do not provide clarification of intent, scope and implementation.

These types of political understandings are crucial. Currently, the Assembly of First Nations is intervening in Regina v. Sparrow in British Columbia. This case, now before the Supreme Court, will be a test case of section 35 of the Constitution Act of 1982. The court will now clarify our aboriginal rights. This interpretation of constitutional clauses belongs within the political process, rather than a judicial system in which legal assessment may not recognize the original intent nor our understanding of the wording.

We strongly believe that the political will in Ontario can facilitate amendments for aboriginal self-government.

In conclusion, at the beginning of this presentation we stated that we had our own laws and our own system. The exclusion of aboriginal people from the decision-making process at Meech Lake can only lead us to believe that the first ministers continue to view the first nations as outside of the governing circle of the Canadian federation. We find ourselves in a position much like Quebec's following the patriation of the Constitution in 1981.

Governments are more than convenient arrangements. They are expressions of determination to shape a nation and to reconcile collective and individual rights in a way that incorporates founding principles or fundamental characteristics of that nation. This is why the absence of the aboriginal government in the Constitution is so distressing. A sense of vision and purpose which constitutions exist to articulate seems to continually be denied the aboriginal people. Collective as well as individual rights may, in a certain sense, be protected by constitutional provisions which are now in place, but collective destinies within the nation of the sort that only we, as aboriginal people, can claim to have are not allowed expression--not yet, not in the absence of an existing recognition of a place for aboriginal governments within the new constitutional guarantee.

To disregard this opportunity for nation-building that the constitutional reform would afford does a disservice to all Canadians. By affording our people respectful recognition in the Constitution as fully legitimate partners in the development of Canada, everyone stands to gain. What has been an obstacle would instead become a gateway for the liberation of our full creative capacities.

There is much to be gained by achieving this constitutional recognition, especially for aboriginal people elsewhere who do not have the opportunity to deal with these essential matters. Ontario and Canada therefore have much to contribute and have an obligation to provide international leadership in this area.

The Anishinabek acknowledge that the Constitution allows for interaction between individuals and groups in a complex way. It must be flexible to allow for the various needs and visions of the members and to provide opportunity for dialogue. It must allow for those people to relate in political activities. But a Constitution which limits the possibilities and opportunities which are sought by its members, especially representation, self-determination and democratic processes for seeking amendments, must be questioned.

The Anishinabek therefore present the following recommendations with regard to the Meech Lake accord.

1. We urge the select committee to express serious reservations about the process used to develop the Meech Lake accord, which excluded the aboriginal people of Canada.

2. We recommend change to the proposed amendment adding subsection 2(1) to the Constitution Act, 1867, to also acknowledge aboriginal people and to affirm that the aboriginal governments will be an expression of that fundamental characteristic of Canada.

3. We recommend that access by first nations to nationally funded programs, despite provincial decisions to opt out, be recognized within subsection 106A(1) in order to preserve the federal jurisdiction and obligations delineated under class 24 of section 91 of the Constitution Act, 1867.

4. We concur with the recommendations of other first nations that the amendments regarding the creation of new provinces be completely deleted, returning to the original provisions of the Constitution Act, 1871, which allows for bilateral agreements between the federal government and the new provinces.

5. We recommend that future conferences be constitutionalized with a view to finding mechanisms for bringing aboriginal people and their governments into the Constitution and, further, that the proposed amendment adding subsection 50(2) to the Constitution Act, 1982, recognize our equal participation in future conferences which include agenda items of significant importance to us.

The inherent right to self-government: We recommend a process by which consensus can be achieved by aboriginal people and the provincial and federal governments for constitutional entrenchment of our inherent right to self-government;

Specifically, that a provincial-aboriginal forum be established within Ontario with the purpose of developing an agreeable amendment to the Constitution Act, 1982, with respect to aboriginal self-government. This agreement must reflect a government-to-government relationship;

That processes be developed by which Ontario will encourage its provincial counterparts and the federal government to consider the Ontario amendment in an effort to seek national consensus prior to a new first ministers' conference on the recognition of aboriginal rights to self-government;

That Ontario identify sufficient human and fiscal resources within the provincial government to address the above recommendations; and

Finally, that adequate resources be provided to aboriginal groups, including the Anishinabek, to ensure that we are able to articulate the principles and develop practical proposals about the nature and scope of aboriginal government and its relationship to other levels of government.

No one is more aware of the political minefields that Indian politics encompass. You have been charged with the responsibility to bring in a report that shows consideration for all people. We trust that the Great Spirit will watch over you and your committee in this time and guide you in your deliberations.

Mr. Chairman: Thank you very much for a very clear and specific brief, particularly the recommendations you have made at the end, including those to do with self-government, which was an issue we did touch on briefly this morning and which I think will be of interest to us as we proceed this afternoon. As you say, we also have your fuller brief, which we can refer to as well.

Mr. Sterling: Thank you very much for coming. In your document you say that had you been participants in the Meech Lake discussions, you could have avoided the problem with regard to provision 16 of the accord. What would you have said to them with regard to that, as it affects section 35 of the Constitution?

1550

Chief Miskokomon: It appears to many aboriginal people that section 16 was almost placed in as an afterthought to protect or shield section 35. We had the same experience in the development of the first Constitution, where the aboriginal section was dropped and then placed back within the Constitution as political pressure was mounted on the government.

Once again, to many of us who have worked within the constitutional process for many years, this is a shielding effect or an afterthought effect. It is not a proper thing, when people build constitutions that, as an afterthought, you include people back in. If a constitution is going to be built, you do not build a constitution and then come back out and say: "Oh, you are back in. Congratulations. We have done a good job for you." That is not patting us on the back. That does not help us. It is an insult to us.

Mr. Sterling: You mentioned in here that you believe the political will in Ontario can facilitate amendments for you. Are you talking about the Meech Lake accord in this regard?

Chief Miskokomon: Currently, there are two schools of thought, one of Ontario's and that of the aboriginal people in Ontario. Ontario feels it has an agreement that was moved within the last constitutional conference but that all Indian people in Ontario had rejected. What we are saying is that in order to gain unanimity on constitutional amendments as they affect aboriginal people, that process should be put in place. The timing has to be right because, in terms of the aboriginal conference that happened last year, I think everyone here can count the number of provinces that were on side and the number that were offside.

It does not seem very productive to continue to have constitutional conferences and to continually walk away denied of one's rights. It seems perhaps more productive that aboriginal people within Ontario begin a process with the government of Ontario to start establishing processes and

establishing amendments and wordings that can lead to those agreements rather than to failures. That is what we are suggesting.

It is not very healthy to go to an aboriginal conference with the first ministers, after all the time and energy our chiefs and our councils and our people put into it, after meeting after meeting and after defining as clearly as today is outside what we are talking about, to count the numbers around the table and to find we do not have them. It is not a healthy feeling. I do not think the first ministers particularly care for that. I know, from our side of the table, we do not.

Mr. Sterling: You mention in your report that you feel betrayed by the Prime Minister with regard to his representing you in the Meech Lake accord hearings. Due to the fact that we have more aboriginal people in Ontario than does any other province in Canada or the territories in one jurisdiction, do you feel that our Premier has adequately represented your interests at the Meech Lake accord?

Chief Miskokomon: I believe that the people who will represent our interests at any constitutional conferences will be us. I do not trust any government to protect our rights based upon our numbers within the Canadian society. We have our own processes of electing our own people and of putting our own spokespersons forward, and that is the only way I feel comfortable that our rights are being protected.

Mr. Sterling: So while you criticize the Prime Minister, you are not willing to criticize our Premier.

Chief Miskokomon: I criticize the Prime Minister specifically because he is charged under subsection 91(24) of the Constitution and has a legal obligation through the Indian Act to uphold treaty rights and is furthermore charged under the Constitution Act of Canada, the highest order of law in the land.

Mr. Sterling: Thank you.

Mr. Breaugh: I appreciate that in your brief you have gone into more detail than some other groups have. I want to see if we can put a framework together here.

The other groups and the joint committee have talked about this first ministers' conference in 1990. I take it you are not in disagreement with that. What you want is something before that conference and something afterwards. You want to make sure that it does not just happen in the way that other conferences on aboriginal rights have happened, that there is a process leading to that and that the conference will be the culmination of efforts to establish, if not a final solution, at least a final path to a solution. Am I getting the drift of your argument here?

Chief Miskokomon: First of all, I am not stuck on 1990. The year 1990 is just a date to me; it will be 500 years after the Europeans landed on our shores. A few more years does not mean very much to me. What does mean a lot is a co-operative spirit as we move along in terms of developing a constitution. We cannot afford to have a feeling that there is a win-lose situation. If we cannot come out of a constitutional process, regardless of the timing of it, where everyone has a good feeling that we have all won something, a rightful place in this country, then there is no sense going to these conferences.

What makes a lot of sense is that we have a clear commitment that we will work in co-operation, not in competition, with Ontario and with the federal side in order to move these amendments along. If in fact we take the closing statements of the premiers at the first ministers' conference in 1987 with us, and we take them at face value--and Mr. Peterson and Mr. Mulroney said that they will work towards establishing aboriginal self-government in Canada--then why are we here a year later without a process? Why in fact did the federal government stop the funding to the national organization necessary to continue the work that is going to be required to bring the sufficient numbers on side to amend the Constitution?

We do not have a process in Ontario to follow that through, and unless we keep the issue on the burner, it will gradually drift away like yesterday's news.

Mr. Breaugh: Let me make an argument, if I can, for the 1990 date. The concern that I have is that if this accord gets finalized, it seems that for many people in our country the rules change completely; their opportunity to get some reasonable redress of wrongs that are 500 years old changes substantively. So in my mind, I would be a proponent of the 1990 date if we do two or three things.

First, put in place a process--and that is both a decision-making mechanism and a funding mechanism--so that the purpose of the exercise is to have some clear resolution on the table that it is the conclusion of a process by 1990. If we do that, my concerns about carrying through this accord are lessened substantively. If by that date I know that a lot of things have happened, but we have had a clear decision or mechanism that says the Charter of Rights and Freedoms has some supremacy over this accord, I will not be terribly worried about some of the questions that have been raised about that during the discussions of this accord.

If we have found some way to accommodate the Yukon and the Northwest Territories in that time frame and we proceed with this, some of my concerns will be alleviated. If we have found some mechanism that is working and we all agree that it does not have to work perfectly, but it is under way and we have a first conference in 1990, which would be just before this thing would be finalized, any concerns I have about what is in the Meech Lake accord concerning aboriginal people would be seen in a totally different light.

That is the argument I am making. I have got to see some progress in the next couple of years that shows me we are on the way to resolution or we have changed our attitudes substantively or we have really changed the process a lot. If we do that, then the Meech Lake accord does not bother me nearly as much as it does now. My concern, frankly, is that if this accord goes as is and none of these other things happens, some very important Canadians have lost their opportunity even to be participants in constitution-making in this country.

1600

Chief Miskokomon: I believe that our experience within the constitutional process has been that two years slips by very quickly. When we started in it in 1982 and into 1983, we essentially ended in 1987 with the same numbers. After going through five years of that without commitments on a national scale, that time flew by very quickly and very little was accomplished. I do not think that by 1990 the political will will be in the rest of Canada. I do not think that the governments in the west are going to

change their position very substantively unless something drastic takes place. I do not see that on the political horizon.

As pragmatists, we have to say that we are into the fight for the long term, regardless of the time frame that it takes. If Ontario is on side with us and wants to be a partner with us in Confederation, then it has to make some real progress and show something serious to us. They have to stop charging our people in court and appealing and appealing and appealing those decisions when they come in our favour. They have to sit down and start talking about how we institutionalize self-government here on the ground and begin some meaningful, significant negotiations, and not play the game of receiving federal dollars, overcharging the feds, taking the money and running and saying: "To hell with the Indians. We'll deal with you later on. You are only one half of one per cent of the population of Ontario." That is the experience we have had.

The year 1990 does not mean very much to me. What I would like to see is a real commitment from the government of Ontario to go with us the long road and do it until we get what we want.

Mr. Breaugh: OK. Fair enough.

Mr. Elliot: Thank you very much for your frankness. I would like to begin my comments by trying to communicate with you the fact that I have been most impressed not only with your presentation but with the other two presentations over the last several days.

My concern is the commitment to the long haul. If I read things correctly and have understood what you have all been saying to us, I see a number of sovereign states in your mind as being the Indian position and the Inuit position across Canada. I can see, as the government of Ontario, having a great deal of dialogue and making a lot of mileage in some of the things you just stated in your answer to the last question.

Now, Ontario is not a sovereign state; it is one of the provinces. In the long haul, I can see Ontario and your peoples in Ontario coming to an accommodation in a lot of ways. I would like to look down the road a bit when we get to the situation when we are talking about a first ministers' conference, and relative to your demand to be represented in such a forum, I am wondering how you will evolve from the situation when you are talking to Ontario with respect to your people in Ontario and tying that into the national group so that at that forum you are heard all across the country.

Do you see this happening province by province from this point on, or do you see it happening in a national vein? I have counted up the provinces, for example, too. I think there are probably four that are not being very accommodating at the present time. Some others are being more accommodating. They are in an array as you judge them province by province in this regard. I am not sure that the lead by Ontario will be sufficient to get other provinces to think uniformly as we do with respect to co-operation.

I know that in 1985 a stance was taken by the government of Ontario that is compatible with what you wish. The problem is that, as you say, very little, if anything, has been done with respect to real accommodation. I see it as a long-range plan too. Where I am having difficulty getting a handle on the whole thing is, when you sit down at the first ministers' conference down the road someplace, who is going to be representing the views of the aboriginal people all across Canada?

Chief Miskokomon: The national chief will be representing the views of the Indian people across Canada, just as he did at the last conferences. We will feed through the mechanisms of political structures we have which feed into that, in much the same way that Ontario and other provinces feed into the federal structure in terms of federalism.

How does Indian sovereignty sit within Canada? I think we can look to other experiences around the world and how aboriginal people either govern themselves or work in co-operation with other governments. We can look towards the Maori experience; some good things have happened in New Zealand that we can look to. We can look south of the border, to the Navajos, to the Hopis, who control their own judicial system, who control their own policing, who control their own enforcement agencies in the administration of law, compatible with the state, compatible with the federal system. We can look to many experiences.

To assume that the Constitution is going to clearly lay out everything that has to be done within Ontario, or any other province for that matter, is an overassumption. I believe when the Constitution is developed, principles are enshrined and are articulated within the Constitution, rather than the specifics of implementation.

When we talk about self-government and sovereignty, we talk about it in those ways. When we talk about implementing, it is up to the Indian people of Ontario and the government of Ontario to sit down and talk about how our jurisdictions overlap with your jurisdictions. In fact, you will have to repeal your laws to make sure Indian rights enshrined within treaties in subsection 35(1) are going to be guaranteed, that we are not constantly at each other's throat, either in court or on the political football field.

We are very tired as aboriginal people, as Indians, to be the political ping-pong between the federal and provincial governments. We want to clarify that. We want to talk about jurisdictions, not only with you from a government-to-government relationship, but we also want to sit down and talk to the feds in the same way and clarify subsection 91(24) and what our interpretations of "treaties" are and what our interpretation of "land claim" is.

It is a funny thing. We owned all the land and we made treaties, but all of a sudden we have treaty rights. It seems to me that if we made the treaties, you are the people who have treaty rights. It is a very strange interpretation of history, but that is what history is about. We have to go back and we have to clarify those things. We have to straighten history back out. We cannot change what happened in the spring of 1987, but should we allow it to repeat?

I do not think anyone here is satisfied with the status quo or you would not be here. I do not think that is the purpose that we come here today with. We are not satisfied and we are not going to stop pushing. If necessary, we are not going to stop going to court and we are not going to stop being at each other's throats. We are going to push until we get what we want. It is like the Fram filter man says: "You can pay me now or you can pay me later." One of these days we will come to an agreement.

Mr. Elliot: I would just like to comment that you may have a lot more support than you recognize at the present time in your endeavours. I hope you keep up the good fight. I have been very impressed.

Mr. Allen: I am very impressed with the presentation you have made, Chief Miskokomon. I note some rather new items you are putting on the table for us; for example, items such as the federal government has responsibility and a trust it should be delivering on. What happens with regard to native peoples when provinces opt out of federal shared-cost programs? That is a very interesting question to pursue that line of thought. I suspect one could make a significant amount of mileage on that one. Certainly, you would unscramble a few constitutional heads and dominion-provincial consultations by putting them through the process of having to work that one out. I think that is a good one to lay before us, the whole question of the intersection of your national objectives as a people, as you are trying to define them, with other people's declared national objectives and so on under the appropriate section--106, etc.--in the Meech Lake agreement.

Your colleagues have laid before us their anxiety and their anger, which you have not quite put in so many words, with respect to the fact that it was so easy to define "distinct society," or at least to get the distinct society language into the Constitution for Quebec, whereas it was so difficult to do that with regard to aboriginal peoples.

1610

I guess my only comment in that respect is that Quebec had the good fortune already to be a politically defined entity in the Constitution, with rights and powers and all the rest of it. What you are trying to do is not only to get recognition as a distinct society but also to get the structure in place to give some life to that. That double process obviously makes it much more difficult, especially since you are running up against other people's power all the time when you try to do that.

You were not here this morning, but you are the second group today to propose that for those who exist, if you like, outside the law, as l'Association canadienne-française de l'Ontario put it the other day, some form of commission or public body in Ontario be struck to work towards defining more clearly in Ontario terms the status of cultural groups--distinct societies, if you want to use that language--that exist within Ontario, to try to give some shape to that. I must say I am quite intrigued by that proposal of your provincial aboriginal forum.

Coming to my question, I was not sure whether I heard you correctly with respect to Mr. Breaugh's questions, so I want to come back to that. Were you saying in response to him that really 1990 and the next round of first ministers' conferences are quite unimportant to you? You have been through the process. You have really given up on that. It is not going to get you anywhere within that time span and therefore you are not going to go for it, getting yourselves on the agenda, and we should not bother with that either.

If there was one simple amendment that ought to be the easiest thing to do with regard to Meech Lake, it should be simply to add renewal of discussions of aboriginal rights to self-government as an item on an agenda. Were you telling Mr. Breaugh that was not something you were concerned to go after at this point, because you have been so disillusioned?

Chief Miskokomon: What I was saying, sir--and I do not want to leave the committee with this misinterpretation; I would like to be very clear on it--is that 1990 is not a significant date in terms of whether or not we have an agenda item there. What is significant in terms of 1990 is whether or not we as Indian people in Ontario can work out processes that will bring other people on to the constitutional bandwagon for aboriginal rights.

We want to have an agenda that clearly will be recognized as an implementation process for self-government and not as an attachment to someone else's agenda. It seems to me that if we were placed as an agenda item somewhere else, we lose the control again. The constant struggle is for Indians to regain some of the control over their own lives, some of the responsibility we feel our leaders should have towards our own people, not to someone in Ottawa or not to someone within this Legislature. The constant struggle that we have is that control is not being relinquished. Therefore, we are at a point of having to take it. To be placed on another agenda is like taking another back seat.

The agenda that was established with regard to aboriginal and constitutional affairs, which went for four years, was something that was very productive and highly educational to many governments, because they have never dealt with the questions before, but we have to stop educating all the time.

We are in for the hard road. I was born Indian; I will die Indian. People are elected and then they are gone. New governments come in, new ministers come in and then they are gone, and we are constantly in the process of educating legislatures, MPs, MPPs. The time is to lead, follow or get the hell out of the way. We want to move forward. We do not like the conditions our communities are in. We do not want to stand for that. I do not think anyone in Canada should have to stand for that.

What we are saying is that we want to be within the constitutional federation. We want to participate within the Canadian economy, within the Canadian lifestyle. We do not want to be seen as welfare people, not within our own country, not within our own land.

Mr. Allen: Those are objectives you ought never to give up on, but I submit that, as you march forward trying to accomplish them, you will go on educating us whether you want to educate us or not, and I think that is good.

Do not get me wrong. I am not questioning what you want to do in Ontario. I think that is a very important proposal. I think you should go for it and I think we should give you all the support we can, because it would begin to define the issue and make it more concrete for a lot of people. Perhaps it could begin to make it more concrete across the country as a whole.

All that I would submit is that I think you should keep your eye on the possibility that two or three governments might well change hands in the course of the next two years and that might change in a significant way what goes on at a first ministers' conference, because the numbers were not all that far away when things ended in March, were they? One could see that there was a possible light at the end of that tunnel, but the numbers were not quite there.

Chief Miskokomon: One was not sure whether it was the train or daylight there, though.

Miss Roberts: I just have a couple of comments, if I might. Mine are to congratulate you as well on your determination to have self-government and self-determination and your emphasis on the fact that you are in there for the long haul, the long road, until you get what you want. But the most important thing you said afterwards was "through an agreement." It is very important to me, and I think to everyone else here, to realize that is the process you are looking to, to have an agreement with, and to come to some realization with both federal and provincial governments on your position, which has historically been in Canada and in Ontario but has not legally been recognized.

I think the other comment by my friend Mr. Allen referred to one simple amendment to the Meech Lake accord, but I think what we are seeing here in this process is that there is no such thing as a simple amendment to the Charter of Rights and Freedoms. What they considered they were doing, simply allowing Quebec in or so that Quebec could come in, has turned into a complete rethinking, a redevelopment of some of the rights of many other groups in Canada, or it may have turned into that.

I hope your participation today and your thoughts today can help us develop a process not only for the first ministers' conference, whether it is in 1990, 1992 or 2001, but that you can help us develop a process in Ontario to start in the appropriate path that is your agenda.

My question after saying all that is very simple. Does the Meech Lake accord in a fundamental way stop you from your agenda?

Chief Miskokomon: That is not such a simple question.

Miss Roberts: I get rough.

1620

Chief Miskokomon: It impedes to a large extent, because I do not believe that a lot of things were constitutionally thought through. I believe that if words are put into the Constitution, they will be nearly impossible to take out. Unless we are very clear on what those words mean, it seems to me counterproductive that we leave it to the courts to continually interpret political will. The courts in Canada do not go that far. They are not as liberal as they are in the United States where they move political will along.

It is the politicians in Canada who have to understand what they putting in and why they are putting things into the Meech Lake accord or why they are putting things into any part of the Constitution regardless of whether it is Quebec and Meech Lake. The aboriginal people north of 60 have had resources, much like the aboriginal people south of 60, and have lost them through treaties, and those treaties have been constantly under question by our people because it is not our interpretation of what happens in Canadian history. Yet when we face the bigger population, they turn their back. It is as if treaties were the final solution. There was someone else who practised the final solution back in the 1930s. He did not get too far.

In the case of the aboriginal people of the north, with the massive land space that they have in Canada, the amount of wealth they have in order to generate a self-sustaining government, the governments of Canada essentially closed the door on the people. It must be a very disheartening thing for the aboriginal people of the north to see that, once the Meech Lake accord comes into effect, they are no longer considered a distinct society. Only the French and English in Canada have their distinctiveness. The original people of Canada have nothing to claim in the Constitution, not the land, not the laws, not their own government, not even their own distinctiveness through their culture and their language.

When you sit on our side of the table, you can only be slapped so many times. That is what I think Meech Lake does to us, and yet, as our regional chief said yesterday, we are prepared to go on one more time and try to negotiate our place in Canada, into our land.

Mr. Chairman: Thank you very much, Chief Miskokomon, for coming here

today and for the very thoughtful presentation and the recommendations. As many members have said, you have introduced, certainly for us, some new concepts, ideas and new directions which I think we want to look at very closely as we prepare our own recommendations. I thank you again.

Chief Miskokomon: Thank you.

Mr. Chairman: I next call upon Leslie Smith to come forward. If I could, while you come forward, I apologize for the hour.

Ms. Smith: I just hope I do not faint from hunger. I have had only two cookies today.

Mr. Chairman: Would you like at least to have some water?

Ms. Smith: This is for the fire in my belly.

Mr. Chairman: We had thought we might be at this point earlier, but I would simply say that if you would like to proceed with your presentation, at the end I am sure we will have some questions. If we can proceed that way, please go right ahead.

LESLIE SMITH

Ms. Smith: I am sure everything I am going to say will have been said before and will be said again, but I would just like to run through this and see what happens.

My name is Leslie Smith. I am not a representative of a special interest group unless, as a citizen of this country and this province, I could be said to represent countless others who, like me, have serious reservations about the Meech Lake accord and no elected representative willing to speak for them.

I thank you for the opportunity to address this body, but you will forgive me, ladies and gentlemen, if at the outset of our discussions I express the suspicion that no matter what I personally say and do, no matter what the opinions of the other speakers at these hearings, the net result of all our--and your--efforts will prove to be nil.

Nevertheless, for the sake of this country, I feel compelled to make the attempt. The situation is one where, to quote that great parliamentarian Edmund Burke, "All that is necessary for evil to triumph is that the good do nothing."

From its inception, I have felt that the Meech Lake accord represents an evil to our nationhood. If left unchecked, it would go on to destroy the very fabric of our government as assuredly as would a civil war.

Yet by what methods are concerned Canadians like myself empowered to fight this threat? Firearms are impossible, however desirable, and as yet, our current elected representatives prefer looking out for their own parochial interests rather than adopting for themselves the more challenging role of statesmen.

If this indeed were a physical war, I would, despite present military restrictions on women in the military, be one of the first to man the barricades. As what we are facing now is an internalized--but just as deadly--struggle, I am forced to rely on strong words and to trust in your common sense and goodwill.

Let us, then, use these hearings as a truly democratic tool and not merely pay cynical lipservice to the process of democracy.

What is the democratic process? Our friend Edmund Burke says, "It is what the people think so." Webster's dictionary calls it "government in which the supreme power is vested in the people and exercised by them." The very word "democracy" has at its root the Greek word "demos," meaning the people.

So why are the people of this country not consulted when radical changes are proposed to their Constitution? You can say, "They are consulted, through their representatives," but I will answer, "How, when all are afraid to oppose and none are given a free vote?" You can say, "Well, we do have these hearings," but we all know that Premier Peterson, like Brian Mulroney, has already stated that these hearings will in no way affect his support for the accord nor the obligated support of his party underlings.

Further, we have all seen how the few mavericks brave enough to stand up for the democratic principles have been figuratively bound and gagged and hustled off into oblivion.

Along with many other thinking people of this nation, I have reached the conclusion that the actual procedure involved in the formulation and ratification of the Meech Lake accord as a part of our Constitution is fundamentally unconstitutional.

To change our country's charter, and therefore its underlying philosophy, ability to function and future direction, without direct consultation with and approval by the majority of the people in this nation is counter to the democratic process and inherently un-Canadian in that our Constitution guarantees us the right of true democratic process.

To implement Meech Lake in the face of this fact would be a political crime of the highest magnitude against the people of Canada.

If I were given a real democratic forum in which to voice my specific objections to this soi-disant accord, I would begin by saying that virtually every clause within it, in my opinion, contains egregious errors.

To start with the one clause that has taken on supreme prominence, let us look closely at the conferral of distinct status on the province of Quebec.

No one in this country is unaware of the fact that Quebec differs greatly from, say, Alberta. Does it necessarily need to be embedded in our Constitution? And if Quebec can thus be singled out as distinct, would the reverse rationale not equally apply to Alberta? And BC? And Nova Scotia? Are these provinces any the less because they are not accorded status as distinct societies?

Is Quebec distinct simply because it is a province where the French language and culture are a large part of its heritage? If Canada historically, traditionally and legally is a bilingual, biheritage nation, why then is all of Canada not classified as distinct?

Further, Quebec cannot claim the sole possession of French speakers or citizens of French heritage strictly within its borders. Is it then distinct merely because a long time ago Lower Canada existed in the approximate area where modern-day Quebec now lies? In this case, as English and French are our joint ancestries, why is Ontario, the modern equivalent of Upper Canada, not also granted a special epithet?

As well, and taking the federal government's approach to multiculturalism to its logical conclusion, why are all Canadian regions with predominant ethnic groups not also declared distinct? While we are about it, how can we turn a blind eye to native Canadians' claim for special status?

Is it fair for any one group within this country to be so singled out, especially as no one can say for sure what effect such status will have on the application of our Charter of Rights or on the ultimate allegiance to our nation of the favoured province?

1630

We have been informed by Brian Mulroney that this "distinct society" title is simply a harmless sop to Québécois pride. But judging from all the fuss and pomp with which he and Robert Bourassa have saluted this sop, we may all be forgiven for seeing it as something a trifle more than negligible.

If it were, in truth, nothing more than a cheaply held honorific, just why has M. Bourassa so eagerly embraced this insult, becoming the first signatory Premier to the accord and, moreover, labelling its every opponent a cultural bigot?

Personally, I do not feel myself a cultural bigot for continuing to believe in Canada's dual heritage, nor for dreaming that one day this entire nation will be fully able to embrace both our traditional cultures and languages. What I do find bigoted are those people and provinces who prefer to stick with their own kind to the exclusion of those who have a constitutional right to equal treatment.

Finally, we reach what the politicians claim is the crux of this "distinct society" clause. They trumpet loudly that this will bring Quebec back into the constitutional fold. Now I may be just a common, garden variety Canadian citizen, but even I am aware that Quebec is already a part of our constitutional Confederation, whether or not the province itself was an actual signatory to the original repatriation.

It is stunning to me to see all three of our federal leaders blinkering themselves to this fact. One would almost suppose that they were more concerned with garnering Québécois votes for the upcoming federal election than with the future of this country.

Almost as egregious as the inequities of the Quebec clause are the errors of judgement contained in many other accord provisions--take granting the provinces the right to submit names for Supreme Court and Senate appointments. While we have been reassured by Mr. Mulroney--and who could question his sagacity or veracity--that this measure is temporary and that the Prime Minister would be bound to consider such submissions only as possibilities, I would venture to suggest that political realities might well turn suggestions into demands and temporary expedience into permanent strictures.

Why, in the first place, should provinces be given the right to dictate in obvious areas of federal jurisdiction? Yet another egregious example of the erosion of federal responsibilities is the provision that will allow provinces to opt out of national initiatives while still receiving full financial grants for the institution of programs similar to federal directives.

Setting aside the vision of a nation where the basic guarantees and standards of life vary drastically from one province to the next, this

proposal would effectively bind the hands of future federal governments in terms of their being able to implement constructive social, financial and other policies for the benefit of the nation as a whole.

Let us turn the light now on that clause wherein it is stipulated that any future changes to the Canadian Constitution must receive the approval of all 10 provinces as well as that of the federal government. This is the area that so greatly interests the Yukon and the Northwest Territories. Will they lose out on provincial status if it eventually comes to the vote? Can indeed the will of the vast majority of Canadians be stymied by one recalcitrant Premier in, say, Prince Edward Island?

You have already been informed at these hearing that this question is purely academic, as the Yukon and Northwest Territories have populations small enough to make them ineligible as full provinces. That response ignores the possibility that in some future era their population levels could conceivably come up to scratch. It also ignores the pertinent query of how PEI itself would fare if it were applying for provincial status today.

But the application of this approval clause would have far greater-reaching effects than those in this one example. Can any constitutional amendment ever be agreed on unanimously, unless, of course, the provinces were first softened up with gift packages of ever-increasing power just like those they have already been ceded for agreeing to the accord itself?

It is more than plain from constitutional conferences of the past 10 years, let alone those of over 120 years, that national unanimity, despite Mr. Mulroney's sometimes protestations, is a near-impossible ideal. In the instance of the Meech Lake accord, we have achieved only a sort of unanimity, yet to be actually confirmed, and this at the high price of castrating for ever federal authority.

We should soon enough see, if this accord is enacted, how long it would take for the provinces to gain complete control over our federal government, for there is another clause in it that calls for permanent biannual first ministers' conferences on constitutional questions and other matters of federal preserve.

Therefore, twice a year, little pieces of our nationhood can be chipped away at random, all in the name of parochial provincial concerns. Are there any of us, particularly after witnessing the shameful sham tactics involved in passing this very accord into constitutional permanence, really that politically naïve as to believe that our premiers, and our Prime Minister too, would always place the good of Canada before their own professional concerns?

Indeed, in the premiers' case, their very job description tends to make this kind of altruism counterproductive. I would like to conclude this summation with the accord aspect that frightens me most profoundly. It is "foreverness." If Meech Lake is indeed ratified, then under its own provisions and unanimity, the chances of any egregious errors being modified or changed altogether will become slim to none. Never would we be able to revert from Brian Mulroney's personal vision for Canada's future.

A distinguished writer, sociologist and former federal politician once compared Canada's historical governance to the pendulum swing on a clock, always moving to and away from a strong central base. I could add that under Meech Lake's provisions, that pendulum would for ever be frozen to one side and the clock consequently would become inoperative. When a nation's synergy,

its ability to be greater than the mere sum of its parts, is destroyed, then so too is the rationale for belonging to that nation.

Under Meech Lake, Canada's parts will become fixed separates, beholden to none but themselves. There will no longer exist the country of Canada, but a weak-jointed, perhaps even disjointed, amalgam of province-states. "Balkanization" is a word I am sure you have heard often enough since the Meech Lake accord was first proposed, but you will hear a great deal more of it, I can promise you, if that accord is accepted.

You will also hear a great deal less of Canada. The new sovereign states of Alberta, Quebec, British Columbia, Ontario and so on will see to that. As provincial leaders grow in power, they will take to direct meddling in what are currently federal matters, negotiating their own private deals with other provinces, even other countries, and looking to Ottawa not for leadership but for rubber-stamp approval.

The office of the Prime Minister and our elected House of Commons will devolve into backwater positions of no more vote value in Canadian affairs than the one out of 11 that Meech Lake proposes. In the name of heaven, why the rush to approve Meech Lake?

Premier Peterson has recently declared that the consequences of amending the accord would be unbelievably serious. He does not, however, go on to define what, in his opinion, would be so serious about it.

An absence of definition is one of the most egregious errors within the accord. During these hearings, you have already heard and will continue to hear what this flagrant vagueness leaves the Canadian people open to in terms of legal and political abuses of our rights and will. Surely this alone would constitute a reservation serious enough to give our legislators pause. Surely it would be far more serious to enshrine a badly flawed accord in our Constitution than to take the time and make the effort to adjust and correct its deficiencies, to better define its terms and priorities, to obtain a real mandate from the people of this nation.

If we do in truth have up to two more years to ratify this accord, then why cannot these concerns be properly addressed? If changes are indeed warranted, why not make these changes before the damage is done? If the democratic process of change and approval means we may take up to five years, or 10, or even 15 to create an accord that truly is an accord, then is this not preferable to the slapdash and haphazard approach to which we are now being subjected?

Constitutional reform is the most serious and far-reaching initiative a nation can undertake. We must, as responsible citizens all, ensure that it is approached properly and that it at all times bears the rights and wellbeing of the people first and foremost. But if the outraged cries of myself and so many other concerned Canadians are really to be ignored, then Canada is as lost to democracy and good government, right now, as it ever would be under the Meech Lake accord.

I thank you for that. I had a couple of supplementary questions, as you see on the next page, selected questions for the committee. These are just something, if they are impertinent, you can mull over.

Neither House of Commons members nor members of this provincial Legislature are allowed to cast a free vote on constitutional reform. Where is the democratic process guaranteed to Canadians under our Constitution?

Why were MPs allowed to vote their conscience about capital punishment, and yet not allowed to follow their conscience when it came to the equally difficult, philosophical question of how this nation is to be governed?

Why must the Constitution be amended as soon as possible, when other national debates, such as the one on abortion, have taken 20 years or more to be decided?

Why is this committee travelling to Quebec to hear the French Canadian opinion of Meech Lake? Why not ask the French Canadians of Ontario? Why is this committee scheduled to hear only those speakers brought forward by M. Bourassa, who is the accord's second biggest promoter?

Will Quebec preserve and protect its "distinct society" status to the exclusion of those rights guaranteed our citizenry in the charter and the Constitution, and in the face of the accord's own requisite that all provinces preserve Canada's linguistic duality?

Setting aside all moral and legal questions concerning the accord itself, we are left with an unhealthy picture of how it was arrived at, through backroom dealings, back scratching, power plays, tradeoffs and empty rhetoric. This may be Mr. Mulroney's brand of politics, but are we Canadians to accept it as our political blueprint for the future?

Attached, I just put in a selection of newspaper clippings that seem to reflect some of the points that I make.

I apologize for the stern tone of this. I did not know exactly what I was going to be facing with this committee. I can see now, from sitting here and listening to you, that a lot of you are very sympathetic to this, but I was not aware of that at the time. For all I knew, this could have been just a hand-picked group of people who were going to rubber-stamp approval of this. I can see now that you all have very serious concerns, as I do, and that you will try to work with those concerns. Whether it will do any good, we will all have to see. I would be glad to answer questions.

1640

Mr. Chairman: Thank you very much. I do not think you need to apologize for the feeling that you expressed. I think oftentimes that is important in terms of getting across, whether it is to this committee or any other body, the views that you do hold.

Just as a matter of public record, in answer to two questions which related to the committee's work or suggested perhaps things we were going to do, we are not travelling to Quebec and we have heard already from some of the franco-Ontarian organizations.

Ms. Smith: I was given that information by the ad hoc committee of women.

Mr. Chairman: We were considering doing that, but we are not. We have heard from some franco-Ontarian organizations, we will be hearing from others and we are not hearing from only those speakers brought forward by Mr. Bourassa. We have had a number of individuals and groups in Quebec who have asked to appear before us. We have tried to identify people so that we can better understand some of the depositions.

Ms. Smith: Again, that was information I got from the ad hoc committee. So that is all up in the air.

Mr. Chairman: I think as we have moved along, we have developed our approach as well, but I just think I would like to clarify that.

Mr. Breaugh: I would like to do something a little unusual. I am going to take a stab at answering some of the pretty valid questions that you have put at the back, and the chairman has answered a couple of things. As I recall what we have discussed, no one has ever really done this. I think it would be useful for people to have on the record the fact that every member of this assembly is quite free to vote any way he wants on this. It may cause him a whole lot of pain to do so.

Ms. Smith: That is right.

Mr. Breaugh: I can attest to that, but there is absolutely nothing that will stop a member of the assembly from voting against his or her party's stand. I can think of two members of the committee who have done that and I suspect that it will happen again. The political judgement call will be, are you prepared to face the wrath of your peers and all of that? As one of several in here who has faced the wrath of his peers, it hurts, but it is not exactly fatal. People should know that.

There will be a lot of discussion over the next little while, I would hope, of all the ramifications of that. In large part, that is what this hearing is about. I am pleased to see that at least in Ontario, unlike some other jurisdictions, to be fair about it, there is a committee process and a public hearing process at work. The questions are being asked and there is at least an opportunity for people to put on the record their concerns. Sadly, that has not been the case in other jurisdictions and may not be in all of the legislatures across the country.

I think the last question that you have posed in front of us is, for me, the biggest one. If this process of changing the Constitution of the country is found to be acceptable by people in Canada, it will be a sad day. I can live with whatever words are put in the agreement. I can live with them mostly because I know they will all be subjected to a court and the court will say: "That is stupid. That is silly. Here is what you really meant." It will be appealed by lawyers on both sides, legislatures will appeal it, Supreme Courts will sit again.

We have just seen an example in the last little while where a court said the law of the country is silly, it does not make sense and is unconstitutional. Then the provincial premiers respond to that and the federal government responds to that. So I am not as worried as some might be about the precise wording of every single sentence in the accord. It will be subjected to a whole lot of scrutiny. I hope it gets that scrutiny before legislatures agree to it.

What concerns me more is the process. If there is a good process for constitutional change set forward out of these hearings and accepted across the country, I will be very happy. But I certainly would want the people of Canada and those in every legislature to say it is no longer acceptable in this country for 11 people to decide the future of the nation, to forbid amendment and to demand ratification within a short period of time. I start from the position that this is totally unacceptable. I hope that all of us finish with the position that it is totally unacceptable. I do not know if that

was their intent. I do know they are on their own little horns of a dilemma. They may be able to cook the deal in Meech Lake, but it does have to be ratified by the various assemblies across the country.

They may put conditions on that. That is probably a more likely scenario than to throw it all out. But I think you have asked some questions that do need some answers. I think we do need to put on the record, for example, that--it is true--the Premier said: "I am going to go part-way. I am going to allow a committee of the Legislature to hold hearings on the matter." He should be congratulated for that because not everybody has had the intestinal fortitude to do it. He has also, in a sense, crippled in part the work of the committee by saying he does not want to hear any amendments.

I know it does not mean that amendments cannot be put. It may mean they cannot carry. I hope it does not preclude other actions, some of which we have sought out and which may in fact be more attractive in the end than an amendment. I am attracted to the idea of getting a court decision on the override provisions of the Charter of Rights and Freedoms over this accord. That is more attractive to me, as a practising politician, than to move an amendment which might carry in Ontario and never get carried in the rest of the assemblies for the next century. So there are other things that have to be considered here.

I thank you for asking those questions and for having the temerity to voice an opinion. If there is a fault in this country, it is that a lot of Canadians have no problem with voicing an opinion in their backyard or in the beverage room, but when there is a formal opportunity for them to put their opinion on the record, they do not seem to have the time. Maybe this will shake them up a little.

Ms. Smith: Could I just respond to a couple of things you said? One is that from the very week this deal came out, I was against it. I listened to the media; everybody was crazy about it. I listened to politicians; they all adored it. It seemed Michael Bliss and I were the only two people in Canada who thought this was crazy. A lot of people have revised their opinion since that time. I have spent, it seems like a long time, writing letters to my MP and to Premier Peterson. I have written him four times and I have gotten one response, just a package letter about how thrilled he is with the deal and not addressing any of my specific questions.

I have written to all three federal leaders, to Premier McKenna and to newspapers. I have written to all sorts of places. Finally, this was sort of my last-ditch effort here. This is everything I feel. You guys get it. That is it. I am leaving it in your, I hope, competent hands. I fully concur with the hopes you were expressing, more so because I voted for Premier Peterson. I happened to support him at the time and I am rapidly losing all respect I have for the man, as a lot of people I know are.

One other thing I can say is that 11 men may have cooked up this deal overnight, but the people of Canada are going to have to eat the slop and it may just prove very bad for our digestion. Are there any other questions?

Mr. Offer: Thank you for the presentation. I would like to zero in on some of the comments you made in the presentation. On page 5, you talk about the whole question of the opt-out provision and national cost sharing, things of this nature. You probably can guess we have been dealing with that particular section in one way or another almost from day one. I think it is important that I ask if you could expand on the reason for your concerns with

respect to this particular provision because, unless I have missed it elsewhere in the presentation, you talk about its being an error. But I do not know if you go that second step and say why it is an error. I am wondering if you could just share that with us.

Ms. Smith: I am saying it is an error because we will not be able to get umbrella activities forming for the whole country. We will have each province setting aside its standards. I am more concerned--regardless of what Mulroney is saying, none of us here, I believe, has any great respect for the man, as far as whether what he says is true, whether we believe it and whether we trust this fellow. I think that a vast majority of the Canadian people feel the same way. Otherwise, the Angus Reid polls and the Gallups and everything else would not be showing the figures that they are.

I am concerned as a citizen and as a woman. I am concerned about things like the national day care program. I am concerned that, if Meech Lake had been in effect, we would never have had the medicare system that we have and we would never have had lots of other systems that we have now. This is not really my area of expertise. I am also taking what I have read and what I have talked to people about into consideration, so I did not broaden that.

1650

Obviously, from the amount of copy I have put into it, my main problem--although I have a problem with the whole thing--is the distinct society status. A lot of other people seem to feel that this is only their just due. I do not and for the reasons I have stated. If we are going to be an equal country where everyone is equal, why are some people more equal than others? I do not think that is being antifrancophone.

I fully believe in a bilingual country, but why are we separating this? "These guys over here get all these rights and privileges, and you guys just have normal rights and privileges." If it is not extra rights and privileges, then what is Bourassa so crazy about? Why is he so thrilled with this if it is just a little sentence that does not mean anything, which is what Mulroney is trying to say?

I think it is a very dangerous precedent to enshrine in our Constitution, a very dangerous phrase to enshrine in our Constitution and I think it is an insult to every other Canadian who does not happen to be a French person from Quebec. I am sorry. That is off the topic of your thing, but I really do not have that much more to say about that. I am just concerned.

Mr. Offer: I would like to go back to that and I understand your answer with respect to the cost-sharing program. I would like to get your opinion, though, on whether it might just not be such a bad idea, with respect to the principle, if in areas of exclusive provincial jurisdiction, as this amendment to section 106A talks about, the provinces should have the opportunity to have programs that meet those national objectives. But national programs in areas of exclusive provincial jurisdiction should also be subject to, in this day and age, the very different realities in Ontario and every other province.

Ms. Smith: There should be that input, yes.

Mr. Offer: Maybe that just is not a bad idea and maybe that is what the amendment is trying to get at. You might have, and we have heard from others that they have, concerns with respect to the wording and what it really

means. In terms of the actual principle, maybe that just is not such a bad idea.

Ms. Smith: I can see your point and I can see that the provincial output would be very important. What I was going to say was about these areas of exclusive provincial concern. We are already broadening, under the Meech Lake accord, several areas of provincial concern. Now they are concerned with our Supreme Court; now they are concerned with our Senate. In future, we are going to have two conferences a year, onward, onward, for ever into time, and, as I say, I am concerned that federal powers are going to be eroded. They are seriously eroded under the accord in my opinion and in the opinion of others, and every year this will go on and on.

Where is federal power? Where are matters of distinct federal concern? Is not the federal government in charge of all the people in Canada? Does it not have a responsibility to the people of Canada for general standards and guarantees of life? I am concerned, yes, with the wording. I think provinces should have an input into what goes down in their own backyards. But when it is a question of, say, "Every Canadian is guaranteed these health services" or "Every Canadian is guaranteed that," and then each province gets to define what, to its mind, are going to be the special services, "This province over here will have these services" and "This province over here will have those services," the federal government is in charge of looking after the welfare of all Canadians.

If you get right down to it, if you are looking at it from a provincial point of view, the federal government really does not have much say in our concerns other than external affairs; from what I have seen of Peterson's globetrotting, maybe not even that. I am sorry. Like I say, I voted for the guy. I really liked him. More fool I.

Mr. Sterling: One of the things I like about your presentation is your recognition--and I do not think I have heard it put forward, although I mentioned it in my speech in the Legislature when I was talking about the Meech Lake accord and we were debating in the Legislature to send it out to this committee--and your pointing out that these constitutional conferences are going to go on and on and on.

My concern is, number one, whether that is the greatest problem we have in this country, when it is going to take us two years to resolve problems relating to a struck-down abortion law, whichever side of the issue you may be on. If that, in fact, is a provincial-federal issue, should they not be addressing that kind of issue rather than dealing with "constitutional matters"?

The second thing I am concerned about is how often these guys are going to tinker with this thing, in terms of dealing with the Meech Lake accord, which I see as a definite problem. During the election--I was one of the 16 Conservatives who were elected in the September 10 election--I saw at the door, first, not enough awareness of the Meech Lake accord or concern about it; but when I did run into it, and I represent an area, the city of Kanata, which is around the Ottawa-Carleton area, it was almost all negative in terms of the Meech Lake accord.

I think it is the preoccupation we seem to be developing in this country to deal with the rules. Every time they get into it--pardon my language--they seem to screw it up more and more. They are dealing with immediate situations to try to forge what the rules of our country should be. I think it is a very, very salient point you have put in here.

Ms. Smith: Rules are what we are really concerned with here. There are no rules for constitutional amendment. There are rules in the United States but there are no real rules here. We have just been doing it in a very slapdash way and we have been doing it with a lot of backroom dealings, which I personally do not like. We are doing it in this instance without consulting the people of Canada. They have absolutely no voice, absolutely no way of being heard, the way it has been set up. It is a stacked deck.

You are right. Not as many people are concerned with this as with free trade or with whether Canada is going to win an Olympic medal in hockey, but they should be. We all know they should be. Those people who do care and the people who would probably learn to care if there was a little more publicity about this, a little more public debate about it, are given no choice in the matter. If not for this matter, what would we need a national referendum for? What would be more deserving of a national referendum than a change in a Constitution which affects all of us, which is the basis of our country? We should have one.

Mr. Sterling: At the very least, I find the process distasteful, as I represent some 70,000 to 75,000 people in dealing with the legislative powers of the province. Basically, anything I have had an opportunity to say has gone for naught and will go for naught unless the Premier is willing to move off the mark.

Ms. Smith: That is why I said what I said at the beginning of this. All our efforts could just be totally wasted. I do not know about you, but I spent over a year working on this on and off and I know that several of you seem to be concerned. It is frustrating. It is frustrating listening to the chief--I am sorry; I do not know his name--sitting there saying, "We do all this work and we come to these conferences and we get our hopes up, and then nothing happens or we are just completely ignored."

This is the way I feel about the people of Canada altogether, not just Indians, not just women. I could have come here as a woman and presented myself as a woman or as an English speaker or as an Ontarian or something. I am a Canadian, and I am a Canadian first, and I really resent people who are Quebecers first or Albertans first, or west coast or east coast first. I do not want to get into a nation where we are defined by our provincial status and not by our national one.

Mr. Sterling: In terms of the aboriginal people's concern, I sat at the constitutional table in 1984 as a minister in Mr. Davis's government and I thought that, if you did not know what you were doing, the best way was the cautious approach in dealing with a constitutional document. That is what makes me so aghast at this.

1700

Ms. Smith: Just forge ahead.

Mr. Sterling: I understand their complete frustration. They went through five conferences and everybody was walking very cautiously along. I thought it is best not to do anything if you do not know what you are doing. Then they come down with this, and I find it extremely unfair.

Ms. Smith: It is not a very pretty picture for the people of Canada. This should not be our blueprint for future constitutional reform or for this reform for that matter.

Mr. Sterling: I only wish you had had the same reaction in the last election.

Ms. Smith: I think if it goes on this way, we will have another reaction in the other way.

Mr. Sterling: We received a reaction in 1985 to what Premier Davis did with regard to the separate school question. I believe that part of the reason the Conservatives got thrown out, regardless of the issue, was the process.

Ms. Smith: I must say something just on that, on separate schools and everything. I laboured within this presentation to tell you, to inform you, that I am not a cultural bigot. I have great respect for French Canadians as well as English Canadians. I even tried learning French. I lived in Paris for seven months and studied, and I am lousy at it now.

I really would like to see a country where one day we do really embrace these two cultures. I embrace them myself. I get annoyed with Quebec for saying, "We are unilingual, uniheritaged." I find it very prejudiced, very bigoted and a denial of Canadians' rights within Quebec. I do not like to look at what Alberta does or Manitoba does in certain instances. I think that is very important. This is not a question of bigotry; this is not a question of "I am against Quebec"; it is a question of "I am for Canada."

Mr. Allen: I am glad you came and I am glad you spoke with feeling, because I think it gives me a sense that Canada matters.

Ms. Smith: To some people.

Mr. Allen: People may come and make a deliverance and it may be critical or it may not, but it is not always invested with feeling and one is not always sure just what matters. I think it is quite clear as you speak what matters to you and that certainly helps us sort out our feelings too.

I feel a little bit, as I listened to you, as if we are sort of back with Galileo trying to cope with the question as to whether the earth is the centre of the universe or not. Galileo, of course, was dumped on pretty heavily. After the judgement was made he said, "None the less, it moves." He was right.

As one lives through these intense frustrations of constitution-making, if one sort of steps back a bit, I think one still has to say that it is not always and in all respects totally being screwed up and nobody is ever getting anything right, nothing is happening and we are not going anywhere.

If I might just comment for a moment, to take your last remarks with regard to Quebec and your sense that some developments there seem to be closing that society off from the rest of us, I think that is the sense of what you are concerned about when you use the words "distinct society." You are afraid that something good is being closed to those of us who appreciate its goodness.

Ms. Smith: Part of our country is being lost.

Mr. Allen: Yet I think you seldom find that things always move in one direction at the same time. I lived in Quebec. Like you, it mattered to me. I took my family and we lived in Quebec for a year leading up to the

referendum and the middle years of the Lévesque first government. It was very exciting and helpful to me to feel the sense of a people taking hold of themselves and their own lives. Part of that, of course, was in a sense discriminating against the rest of us, but it was important that they do that in order to become themselves. Do you see what I am getting at?

Ms. Smith: I see what you are getting at, but I think that process has been gone through.

Mr. Allen: Well, yes and no. Again, if we look at what happened coincidentally with the assertion of Bill 101, there were at the same time more francophones, more Québécois, studying English than at any time in Quebec's past. At the same time they were asserting themselves, anglophones living in Montreal at that time were telling me that the personal relationships between themselves and Quebecers were better than they had ever been in their history.

I think when one goes through these processes, one has to accept a certain degree of marching backwards and forwards as one makes progress. Do you know what I mean?

Ms. Smith: I do.

Mr. Allen: I think one ought not to be perhaps too quick in damning it out of hand.

Ms. Smith: You will notice in my brief I was talking about the pendulum swing of the clock. I think Meech Lake is the danger because it says, "This is the way it is for ever." We do not have the swing back and forth that you were talking about, with a strong central government or with a dialogue on Quebec.

You do not have to tell me about discrimination. I am a woman and I have experienced just what Quebecers are going through, what native Canadians are going through, what blacks and everybody else goes through. I can feel that swing of dialogue. I get so thrilled that some men seem to understand women's problems, and then every once in a while I will run into somebody who just has not the foggiest and, moreover, does not give a damn.

I understand that Quebec has special problems, but I am saying we do not need to enshrine these words in our Constitution. This is something that is part of the living, breathing fabric of our country and we have to let it live and breathe. We cannot strangle it with words in stone. You know, "There it is and this is the way it is going to be for all time."

I am on your side. I agree there has to be a swing back and forth. I do not think we get that in Meech Lake. Once this goes into effect, that is it. There never will be a chance for anybody to go back from what it states on Quebec or anything else. That is the way I feel.

Mr. Allen: I am not sure that I do agree with that. Over quite a long period in our history, we have been wrestling with how to express some of the distinctivenesses of aspects of our society. One of the major problems, I submit, in our country is that we have had great trouble in finding language that does indeed express what the reality of Quebec is as an entity that is, in significant respects, different from the rest of the country, not that it is different in terms of the application of equality rights or the application of multicultural concerns and considerations, but that (a) there is something

different about the history, and (b) there is something different that attaches to the language and its being a different linguistic entity.

Ms. Smith: I disagree with that. As I said, if Canada has two languages, two histories, we should embrace them both. We should not say that this is different, this is better, this is somehow unique; it is not.

Mr. Allen: But if you just simply assume that, then what you are left with is a minority-language culture in a majority-language culture, which without certain kinds of distinctive powers and assets, is always and inherently at a disadvantage, surely. That is where, I think with all respect to Ramsay Cook, Michael Bliss, Pierre Elliott Trudeau and even perhaps Henri Bourassa and his vision of Canada, it is necessary to make some recognition in some formal way of collective and community rights as distinct from individual rights. Surely our Constitution is, in some important respects, better for having done that in the past and being able to do it in the future.

Ms. Smith: Let me put to you, sir, are women in this country distinct from the men? Do native Canadians not have a different language and a totally different culture, much further separate from English and French? What about ethnic populations? What about the Portuguese community? My God, you could go and split this nation down into a small, little group--compartments, as somebody was saying today--of people and you could say, "Well, they are all special and they are all distinct," but to say that this group of people, which is half of our nation, half of our heritage, is separate and distinct, I am sorry, I do not agree with that.

I realize they have to have a little culturing of their language, of their culture, and I think that is something we can work towards and work with them, or let them work it out on their own, I do not know; whatever they want. But I do not see the necessity for putting something like that in our Constitution, where it leaves the rest of us in Canada and people in Quebec open for all sorts of abuses, depending on which way the legal and political system goes in the future.

There are no guarantees. Everybody comes here and says: "I think this is going to happen. I don't think this is going to happen." I am scared to death of what is going to happen. That is the way I feel. I am scared because I do not trust politicians--not you--as I said, and bureaucrats to take a very altruistic view of Canada.

Mr. Allen: I do not trust them either, but I just would submit to you that the construction of our Constitution in the past, both in its written and unwritten form, is in fact the kind of constitution that you just described, and that is the reality of what we live with in Canada.

To take the written part of it, I think the Constitution was referred to the little bill of rights in the Constitution, which includes certain special recognitions of French and English language in certain institutions. It affects a special place native peoples have with respect to the treaties, even though they are not happy with that. It does in fact enshrine different kinds of relationships between the federal government and different provinces because they all came into Confederation under different terms.

On the unwritten side, it does, for example, recognize special concessions made to pacifist minorities that came to Canada, such as the Mennonites, the Hutterites and so on. We have now in the course of the Charter of Rights said that certain things that are called multicultural rights are

there. We have said that women's rights stand equally alongside of men's rights, and that is going to call a certain amount of identification over time because they may not always be equal or be expressed in particularly identical ways.

Is that not the nature of the society we have? If there is a problem in our political culture recognizing that--

Ms. Smith: I am concerned that Meech Lake creates a hierarchy of rights, that some groups are more equal than others.

Mr. Chairman: I think this is at the heart, root and branch of everything we are doing, but I am also mindful of the time. I think these are certainly part and parcel of what we are trying to deal with. I hope that out of coming today, it will encourage other private citizens not to fear walking in on members of the Legislature as they sit in committee. I think it is at times a problem for committees where, quite appropriately, one has representatives of different groups and organizations and it is very important that individual citizens come forward as well.

We thank you very much for taking the time to prepare this for meeting with us today. As we work our way through this, I hope we will be able to find the right way and act not only as Ontarians but also as Canadians.

Ms. Smith: I hope so too. Anyway, thank you.

Mr. Chairman: Thank you.

The committee adjourned at 5:14 p.m.



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